UNITED STATES REPORTS

VOLUME 454

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1981

(BEGINNING OF TERM)

OCTOBER 5, 1981, THROUGH JANUARY 12, 1982

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

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ERRATA

449 U. S. CXLV, line 17: "945" should be "946".
450 U. S. 552, line 12: Insert "very" after "made".

G L Stacks
Depos. U.S.A.
5-4-84

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, ATTORNEY GENERAL.
REX E. LEE, SOLICITOR GENERAL.*
ALEXANDER L. STEVAS, CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
ROGER F. JACOBS, LIBRARIAN.

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*Solicitor General Lee was presented to the Court on October 5, 1981 (see *post*, p. v).

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

(For next previous allotment, see 423 U. S., p. VI.)

PRESENTATION OF THE SOLICITOR GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, OCTOBER 5, 1981

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR.

Mr. Deputy Solicitor General Lawrence G. Wallace presented the Honorable Rex E. Lee, Solicitor General of the United States.

THE CHIEF JUSTICE said:

Mr. Solicitor General, the Court welcomes you to the performance of the important office that you have assumed, to represent the government of the United States before this Court. Your commission will be duly recorded by the Clerk.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1981

DUCKWORTH, WARDEN *v.* SERRANO

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-2041. Decided October 19, 1981

Respondent, whose Indiana state-court conviction for murder was affirmed by the Indiana Supreme Court, unsuccessfully sought habeas corpus relief in a Federal District Court. On appeal to the Court of Appeals, respondent claimed for the first time that he had been denied effective assistance of counsel, on the basis of a prosecution witness' testimony at the state trial that she had been represented on a traffic charge by the law firm of respondent's attorney and that she had asked respondent's attorney to represent her on a pending robbery charge, unrelated to the murder. The Court of Appeals reversed the District Court's dismissal of the habeas corpus petition, concluding that there was a *per se* violation of the Sixth Amendment guarantee of effective representation, and that "in view of the clear violation" of respondent's rights and "in the interest of judicial economy," there was no reason to await the state court's initial consideration of the issue.

Held: The Court of Appeals was obligated to dismiss respondent's petition because obvious constitutional errors, no less than obscure transgressions, are subject to the well-settled requirement, codified in the federal habeas statute, 28 U. S. C. §§ 2254(b) and (c), that a state prisoner must normally exhaust state remedies before a writ of habeas corpus can be granted by the federal courts. Creating an exception to the exhaustion requirement for "clear violations" would not promote judicial economy,

but rather would invite habeas petitioners to make a practice of first seeking relief on these grounds in federal courts.

Certiorari granted; 654 F. 2d 725, reversed and remanded.

PER CURIAM.

The motion of respondent to proceed *in forma pauperis* and the petition for writ of certiorari are granted.

This habeas corpus case involves the presentation to a federal appellate court of an ineffective-assistance-of-counsel claim that had never been raised in a state court. Respondent, Isadore Serrano, was convicted of the murder of Debra Gomez in Sunnyside Park, East Chicago, Ind. At trial, Norma Hernandez testified that Serrano had told her that he had killed Gomez. The respondent was represented by William Walker. Upon cross-examination, Mrs. Hernandez stated that the firm of Walker & Walker had represented her on a traffic ticket in the past and that she had asked William Walker to represent her on a pending robbery charge, unrelated to the Gomez slaying. Serrano did not challenge the effectiveness of counsel in his appeal to the Indiana Supreme Court, which affirmed his conviction, *Serrano* v. *State*, 266 Ind. 126, 360 N. E. 2d 1257 (1977), or before the Federal District Court, which dismissed his petition for a writ of habeas corpus.

The issue was first raised in the Court of Appeals for the Seventh Circuit, which reversed the District Court's dismissal on grounds that Serrano's attorney's representation of a prosecution witness constituted a *per se* violation of the Sixth Amendment guarantee of effective representation. 654 F. 2d 725 (1981). While acknowledging that the ineffective-assistance argument had never been presented to the state courts, the court nevertheless decided that "in view of the clear violation" of respondent's rights and "in the interest of judicial economy," there was no reason to await the state court's consideration of the issue. App. to Pet. for Cert A–3.

No cases were cited by the Court of Appeals in support of its decision. Nor could such support reasonably be found.[1] It has been settled for nearly a century that a state prisoner must normally exhaust available state remedies before a writ of habeas corpus can be granted by the federal courts. *Ex parte Royall*, 117 U. S. 241 (1886); *Ex parte Hawk*, 321 U. S. 114 (1944); *Irvin* v. *Dowd*, 359 U. S. 394, 404–405 (1959); *Nelson* v. *George*, 399 U. S. 224, 229 (1970); *Picard* v. *Connor*, 404 U. S. 270 (1971); *Pitchess* v. *Davis*, 421 U. S. 482 (1975). The exhaustion requirement, now codified in the federal habeas statute, 28 U. S. C. §§ 2254(b) and (c),[2] serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights. *Picard* v. *Connor*, *supra*, at 275; *Wilwording* v. *Swenson*, 404 U. S. 249, 250 (1971). An exception is made only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief. See, *e. g.*, *Wilwording* v. *Swenson*, *supra*, at 250. State courts are "equally bound to guard and

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[1] *Roberts* v. *LaVallee*, 389 U. S. 40 (1967), referred to by respondent as an example where the possibility of success in the state courts did not require denying relief, is not to the contrary. The habeas petitioner in *Roberts* thoroughly exhausted his state remedies, and we held, relying upon *Brown* v. *Allen*, 344 U. S. 443, 449, n. 3 (1953), that "Congress had not intended 'to require repetitious applications to state courts.'" 389 U. S., at 42.

[2] Title 28 U. S. C. § 2254 provides in pertinent part:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court should not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

protect rights secured by the Constitution," *Ex parte Royall*, *supra*, at 251, and here neither the Court of Appeals nor the respondent contends that Indiana's postconviction procedures are inadequate to adjudicate the ineffective-assistance claim.[3] Because obvious constitutional errors, no less than obscure transgressions, are subject to the requirements of § 2254(b), the Court of Appeals was obligated to dismiss respondent's petition.

Sound judicial policy points in the same direction. Creating a new exception for "clear violations" would not promote judicial economy, but rather would invite habeas petitioners to make a practice of first seeking relief on these grounds in federal courts. Significantly more time and resources would be consumed as district and appellate courts examined the merits to determine whether a claim met the requisite level of validity to justify dispensing with the exhaustion requirement. It is likely that in most cases the violation would not be so "clear" and that state prisoners would be directed to seek relief in the state system. Moreover, even when such clear violations are found, considerations of federal-state comity would still inhere, and it would be unseemly in our dual system of government for the federal courts to upset a state-court conviction without affording to the state courts the opportunity to correct a constitutional violation. *Picard* v. *Connor*, *supra*, at 275.

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[3] Indiana Rules of Procedure for Post-Conviction Remedies, Rule 1, § 1, provides that

"(a) Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims

"(1) that the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state

. . . . . .

". . . may institute at any time a proceeding under this rule to secure relief."

The Seventh Circuit has previously recognized that resort to this procedure was necessary to fully exhaust state remedies. *Evans* v. *Lane*, 419 F. 2d 1337, cert. denied, 398 U. S. 939 and 944 (1970).

The Court of Appeals engrafted an exception onto the habeas statute not envisioned by Congress, inconsistent with the clear mandate of the Act, and irreconcilable with our decisions requiring the exhaustion of state judicial remedies. Therefore, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

JUSTICE MARSHALL dissents.

CHARDON, SECRETARY OF PUBLIC EDUCATION OF PUERTO RICO, ET AL. *v.* FERNANDEZ ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 81-249. Decided November 2, 1981*

Held: With respect to the claims of respondents, former nontenured administrators in the Puerto Rico Department of Education, that their terminations of employment violated 42 U. S. C. § 1983, the applicable 1-year limitations period began to run from the dates when they received letters notifying them that their appointments would terminate at specified dates in the future, rather than from the dates of actual termination. Cf. *Delaware State College* v. *Ricks*, 449 U. S. 250.

Certiorari granted; May 8, 1981, judgment (648 F. 2d 765) and June 11, 1981, judgments reversed and cases remanded.

PER CURIAM.

Respondents were nontenured administrators in the Puerto Rico Department of Education during the 1976–1977

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*Together with *Chardon, Secretary of Public Education of Puerto Rico, et al.* v. *Rodriguez; Chardon, Secretary of Public Education of Puerto Rico, et al.* v. *Santiago de Orta; Chardon, Secretary of Public Education of Puerto Rico, et al.* v. *Angiuta de Rios; Chardon, Secretary of Public Education of Puerto Rico, et al.* v. *Sanchez; Chardon, Secretary of Public Education of Puerto Rico, et al.* v. *Santana; Chardon, Secretary of Public Education of Puerto Rico, et al.* v. *Perez-Ramirez; Chardon, Secretary of Public Education of Puerto Rico, et al.* v. *Roman de Molina; Chardon, Secretary of Public Education of Puerto Rico, et al.* v. *Collazo; Chardon, Secretary of Public Education of Puerto Rico, et al.* v. *Garcia; Chardon, Secretary of Public Education of Puerto Rico, et al.* v. *Lopez de Ferra; Chardon, Secretary of Public Education of Puerto Rico, et al.* v. *Beltran; Chardon, Secretary of Public Education of Puerto Rico, et al.* v. *Cacho de Freytes;* and *Chardon, Secretary of Public Education of Puerto Rico, et al.* v. *Navarro*, also on petition for certiorari to the same court (see this Court's Rule 19.4).

school year.[1] On dates prior to June 18, 1977, each respondent was notified by letter that his appointment would terminate at a specified date between June 30 and August 8, 1977. On June 19, 1978, Rafael Rivera Fernandez filed a complaint alleging that the terminations violated 42 U. S. C. § 1983. The District Court dismissed the suit, holding that the action had accrued on the date the employees received the letters and that the claims were therefore barred by the applicable 1-year statute of limitations, P. R. Laws Ann., Tit. 31, § 5298(2) (1968). The Court of Appeals for the First Circuit reversed on the ground that the limitations period did not begin running until respondents' appointments ended. 648 F. 2d 765 (1981).

The decision below is contrary to a recent decision of this Court: *Delaware State College* v. *Ricks*, 449 U. S. 250 (1980). In that case, Ricks filed suit alleging that the denial of tenure at a state college deprived him of his rights under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, and under 42 U. S. C. § 1981. And we held that the applicable limitations periods began to run when Ricks was denied tenure, rather than on the date his employment terminated. His action was, therefore, time-barred.

The Court of Appeals for the First Circuit distinguished *Ricks* on the ground that Ricks had alleged that *denial of tenure* was the "unlawful employment practice," whereas here respondents allege that *termination of their employment* as administrators was the "unlawful employment practice."

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[1] Petitioners request a writ of certiorari to the Court of Appeals for the First Circuit to review a total of 14 judgments entered in favor of 36 respondents. The published decision, discussed in text, represents one judgment in a suit brought by 23 respondents; that decision was issued May 8, 1981. See 648 F. 2d 765 (1981). Identical individual judgments in favor of the other 13 respondents were issued on June 11, 1981. See App. to Pet. for Cert. 11a (unpublished orders).

We think *Ricks* is indistinguishable. When Ricks was denied tenure, he was given a 1-year "terminal" contract. Thus, in each case, the operative decision was made—and notice given—in advance of a designated date on which employment terminated.[2]

In *Ricks*, we held that the proper focus is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful. 449 U. S., at 258. The fact of termination is not itself an illegal act. In *Ricks*, the alleged illegal act was racial discrimination in the tenure decision. *Id.*, at 259. Here, respondents allege that the decision to terminate was made solely for political reasons, violative of First Amendment rights. There were no other allegations, either in *Ricks* or in these cases, of illegal acts subsequent to the date on which the decisions to terminate were made. As we noted in *Ricks*, "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.*, at 257. In the cases at bar, respondents were notified, when they received their letters, that a final decision had been made to terminate their appointments. The fact that they were afforded reasonable notice cannot extend the period within which suit must be filed. We therefore grant certiorari. The judgments entered below on May 8, 1981, and June 11, 1981, are reversed, and the cases are remanded for further proceedings consistent with this decision.

Reversed and remanded.

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[2] Delaware State College had a policy of giving a final 1-year contract to teachers who were denied tenure. Only when that contract expired, did the "employment relationship en[d]." 449 U. S., at 253. Apparently, the practice of the Puerto Rico Department of Education was similar in principle. Following a decision to terminate, the actual ending of employment was deferred to a designated date. Advance notice of termination is a customary and reasonable employment practice which affords the employee an opportunity to find another job.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

While I agree with the analysis of Judge Campbell for the Court of Appeals, and therefore join in the dissenting opinion of JUSTICE STEVENS, I believe this *per curiam* disposition is particularly ill-conceived.

It is one thing to hold, as was held in *Delaware State College* v. *Ricks*, 449 U. S. 250 (1980), that for the purpose of computing the limitations period, a cause of action for denial of a benefit such as tenure, and consequent damage, accrues when the plaintiff learns that he *has been* denied that benefit; it is quite another to hold, as the Court does here, that a cause of action for damages resulting from an unconstitutional termination of employment accrues when the plaintiff learns that he *will be* terminated. To my knowledge, such a rule has no analogue in customary principles of limitations law. See 4 A. Corbin, Contracts § 989 (1951) ("The plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and he would be so penalized if the statutory period of limitation is held to begin to run against him immediately").

The thrust of the Court's decision is to require a potential civil rights plaintiff to measure the time for filing his claim from the moment some form of injunctive relief first becomes available. The effect of this ruling will be to increase the number of unripe and anticipatory lawsuits in the federal courts—lawsuits that should not be filed until some concrete harm has been suffered, and until the parties, and the forces of time, have had maximum opportunity to resolve the controversy.

Because this case is plainly distinguishable from *Ricks*, and the decision potentially far-reaching in its impact, the issue should be decided only upon plenary review. The Court's summary reversal is therefore particularly inappropriate, and I respectfully dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

After noting that most judges who have confronted the issue have reached a conclusion at odds with the Court's holding today, Judge Campbell, writing for the Court of Appeals, cogently explained why the decision in *Delaware State College* v. *Ricks*, 449 U. S. 250, is not dispositive and should not be followed in this case:

> "The issue of when the cause of action accrues depends, we believe, on when the alleged unlawful act occurred. It is necessary, therefore, to identify the unlawful act. Where, as here, the claim is that an employment decision was made for a prohibited reason, it could be argued that the unlawful act was the making of the decision, rather than the implementation of it. But we think such a refined rule would depart too sharply from the understanding of ordinary people. The plaintiffs in these cases are complaining that they were demoted or discharged, not merely that a decision was made on a particular occasion, of which notice was then given, to take such action against them. Had the decision been made but not yet implemented, equitable relief might have been sought to forestall irreparable harm, but it is unlikely that plaintiffs would have sought or received damages until or unless the threatened action was consummated. The alleged unlawful act was revocable, incomplete and, for practical purposes, nonexistent until the actual demotion or discharge.
>
> "Moreover, important policies of judicial administration favor a rule based on the date of implementation. While the date of notice in the present cases was easily established, other cases would surely arise in which resolution of that question would require lengthy proceedings. Notice might be oral, or it might be ambiguously phrased, or it might be transmitted by one whose au-

thority is subject to question. We see no value in requiring courts and parties to devote their resources to litigating the adequacy of notice, when the date of the action itself is easily determined. In saying this we are aware that the Supreme Court has declined to reach out for an easily identified date when that date bears no genuine relationship to the act of which plaintiff complains. *Compare Delaware State College* v. *Ricks*, [449 U. S. 250] (1980) (date of termination not sufficiently connected to the challenged denial of tenure), discussed *infra*. But where, as here, the date that is most closely related to the plaintiffs' claim is also the date most easily identified, we think concern for adoption of the rule that best promotes certainty and eliminates litigation over technical niceties is well warranted.

"After the district court's decision of these cases, the Supreme Court decided *Delaware State College* v. *Ricks*, *supra*. Defendants contend that that decision compels affirmance here. We disagree. Ricks, a black Liberian instructor, was informed in June 1974 that the faculty of Delaware State College had voted to deny him tenure. In accordance with the school's usual practice, he was thereafter granted a one-year terminal contract, after which his employment with the school ended. In his suit alleging discrimination on the basis of national origin, Ricks contended that the limitations period under Title VII began to run only when he left the university in June 1975. The Supreme Court rejected this argument and concluded that Ricks' cause of action had accrued when he was notified of the denial of tenure, in June 1974, and that his suit was therefore barred. The Court focussed on the allegations of Ricks' complaint, which it found to charge discrimination in the denial of tenure, not in the discharge or any other subsequent action. The Court held that the denial of tenure was the 'unlawful employment practice' within the meaning of Title

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VII, and that the date of that action was therefore the beginning of the limitations period. Three justices, in dissent, accepted the majority's analysis (*i. e.*, that denial of tenure, not discharge, was the unlawful employment practice) but placed the denial of tenure at a later date because of the later decision of an internal grievance board. Justice Stevens, alone among the justices, took the view that denial of tenure is analogous to advance notice of discharge. Based on that analogy, he argued that the date of discharge should control.

"Refusal of the *Ricks* majority to adopt Justice Stevens' analogy does not seem to us in any way to repudiate the precedents to which he sought to draw an analogy. The majority held merely that the denial of tenure in the academic setting is fundamentally different from a notice of discharge; it is a distinct and separate employment action, with important and far-reaching consequences for all aspects of the employee's status. While denial of tenure is often followed by discharge, it is not always, and the consequences of denial of tenure are not dependent on its being followed by discharge. The Court found that Ricks' complaint was based on the denial of tenure, which was effective immediately; it followed, therefore, that the limitations period began as soon as Ricks received notice of that action. Here, plaintiffs complain of discharges and demotions, not of any distinct event that occurred on an earlier date. The letters notifying them of the planned actions were notice and nothing more; they were not actions in themselves comparable to the denial of tenure.

"To be sure, as we have said, one can argue that the notices themselves mirror the allegedly discriminatory motives of the defendants. One can also argue that a suit for injunctive relief might lie after receipt of notice (or, indeed, even before) to forestall threatened irreparable harm. Still plaintiffs' quarrel is with their demo-

tions and discharges—not with the notices themselves. No actual harm is done until the threatened action is consummated. Until then, the act which is the central focus of the plaintiffs' claim remains incomplete. Such was not the situation in *Ricks*, where the denial of tenure was itself the completed act being challenged.

"We conclude, therefore, that *Ricks* is inapplicable to these cases, and that the district court erred in dismissing the complaints." 648 F. 2d 765, 768–770 (CA1 1981) (footnotes omitted).

For the reasons stated by the Court of Appeals, I respectfully dissent.

JAGO, FORMER SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, ET AL. *v.* VAN CUREN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80–1942. Decided November 9, 1981

Held: The Due Process Clause of the Fourteenth Amendment was not violated by the Ohio Adult Parole Authority's rescission, without a hearing, of its decision to grant respondent early parole. The rescission, which occurred before respondent was released, resulted from the Authority's having learned that respondent had made false statements in an interview conducted before the decision to grant parole and in his proposed parole plan. After conceding that Ohio law created no protected "liberty" interest in early parole, the Court of Appeals erred in concluding that a liberty interest arose from the "mutually explicit understandings" of the parties and that the rescission without a hearing thus violated due process. The "mutually explicit understandings" language of *Perry* v. *Sindermann*, 408 U. S. 593, relied on by the Court of Appeals, relates to the Fourteenth Amendment's protection of "property" interests, rather than "liberty" interests such as that asserted by respondent. Cf. *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458.

Certiorari granted; 641 F. 2d 411, reversed.

PER CURIAM.

After pleading guilty to embezzlement and related crimes, respondent was sentenced by an Ohio court to not less than 6 nor more than 100 years in prison. Under existing law respondent would have become eligible for parole in March 1976. On January 1, 1974, however, Ohio enacted a "shock parole" statute which provided for the early parole of first offenders who had served more than six months in prison for nonviolent crimes. Ohio Rev. Code Ann. § 2967.31 (1975).

Pursuant to this statute, respondent was interviewed on April 17, 1974, by a panel representing the Ohio Adult Parole Authority (OAPA). The panel recommended that respondent be paroled "on or after April 23, 1974," and OAPA subse-

quently approved the panel's recommendation. Respondent was notified of the decision by a parole agreement which stated:

> "The Members of the Parole Board have agreed that you have earned the opportunity of parole and eventually a final release from your present conviction. The Parole Board is therefore ordering a Parole Release in your case." Brief in Opposition 1.

Respondent attended and completed prison prerelease classes and was measured for civilian clothes.

At a meeting six days after the panel's interview with respondent, OAPA was informed that respondent had not been entirely truthful in the interview or in the parole plan that he had submitted to his parole officers. Specifically, respondent had told the panel that he had embezzled $1 million when in fact he had embezzled $6 million, and had reported in his parole plan that he would live with his half brother if paroled when in fact he intended to live with his homosexual lover.[1] As a result of these revelations, OAPA rescinded its earlier decision to grant respondent "shock parole" and continued his case to a June 1974 meeting at which parole was formally denied. Neither at this meeting nor at any other time was respondent granted a hearing to explain the false statements he had made during the April interview and in the parole plan which he had submitted.

After denial of his parole, respondent brought a mandamus action against OAPA. The Supreme Court of Ohio held that OAPA was not required to grant respondent a hearing and that it could not be commanded to recall its decision rescind-

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[1] In his brief in opposition to the petition for certiorari, respondent does not contest OAPA's conclusion that he misrepresented the amount of his embezzlement to the interviewing panel, and admits "that the total loss was over a million dollars." Brief in Opposition 2. Moreover, respondent admits that his parole plan misrepresented his relationship to the person with whom he planned to live upon release. *Id.*, at 2–3.

ing parole. *State ex rel. Van Curen* v. *Ohio Adult Parole Authority*, 45 Ohio St. 2d 298, 345 N. E. 2d 75 (1976). We denied respondent's petition for certiorari to review the decision of the Supreme Court of Ohio. 429 U. S. 959 (1976).

Respondent then filed a petition for a writ of habeas corpus in the Federal District Court for the Southern District of Ohio, claiming that the rescission without hearing violated his right to due process of law under the United States Constitution. The District Court denied the writ and the United States Court of Appeals for the Sixth Circuit summarily affirmed the denial. *Van Curen* v. *Jago*, 578 F. 2d 1382 (1978). We granted certiorari, vacated the judgment of the Court of Appeals, and remanded for further consideration in light of our decision in *Greenholtz* v. *Nebraska Penal and Inmates*, 442 U. S. 1 (1979). *Jago* v. *Van Curen*, 442 U. S. 926 (1979).

On remand the Court of Appeals in turn remanded to the District Court for further consideration. Applying *Greenholtz*, the District Court determined that "early release in Ohio is a matter of grace" and that Ohio law "is fairly unambiguous that no protectable interest in early release arises until actual release." App. to Pet. for Cert. 24A–25A. Accordingly, the District Court held that the rescission of respondent's parole without a hearing did not violate due process.

On appeal, the Court of Appeals acknowledged that "[p]arole for Ohio prisoners lies wholly within the discretion of the OAPA," and that "[t]he statutes which provide for parole do not create a protected liberty interest for due process purposes." 641 F. 2d 411, 414 (1981). Nonetheless, the Court of Appeals reversed the decision of the District Court. Relying upon language from our decision in *Perry* v. *Sindermann*, 408 U. S. 593 (1972), the Court of Appeals concluded that a liberty interest such as that asserted by respondent can arise from "mutually explicit understandings." See *id.*, at 601. Thus, it held:

> "Having been notified that he 'ha[d] been paroled' and that 'the Board is ordering a Parole Release in your case,' [respondent] had a legitimate expectation that his early release would be effected. This expectation was a liberty interest, the deprivation of which would indeed constitute a grievous loss. It was an interest which could not be taken from him without according [him] procedural due process." 641 F. 2d, at 416.

We do not doubt that respondent suffered "grievous loss" upon OAPA's rescission of his parole. But we have previously "reject[ed] . . . the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." *Meachum* v. *Fano*, 427 U. S. 215, 224 (1976). In this case, as in our previous cases, "[t]he question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property language of the Fourteenth Amendment.'" *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). We hold that the Court of Appeals erred in finding a constitutionally protected liberty interest by reliance upon the "mutually explicit understandings" language of *Perry* v. *Sindermann*, *supra*.

Our decision in *Sindermann* was concerned only with the Fourteenth Amendment's protection of "property" interests, and its language, relied upon by the Court of Appeals, was expressly so limited:

> "We have made clear in [*Board of Regents* v. *Roth*, 408 U. S. 564, 571–572 (1972)], that 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' *Id.*, at 577. A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit

understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." 408 U. S., at 601.

To illustrate the way in which "mutually explicit understandings" operate to create "property" interests, we relied in *Sindermann* upon two analogous doctrines. First, we compared such understandings to implied contracts:

> "[The] absence of . . . an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in re-employment. . . . [T]he law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.'" *Id.*, at 601–602.

That the implied-contract aspect of *Sindermann* "understandings" has been limited to the creation of property interests is illustrated by *Bishop* v. *Wood*, 426 U. S. 341 (1976), another property interest case in which we relied upon the "understandings" language of *Sindermann* to conclude that "[a] property interest in employment can, of course, be created by ordinance, or by an implied contract." 426 U. S., at 344 (footnote omitted).

Principles of contract law naturally serve as useful guides in determining whether or not a constitutionally protected property interest exists. Such principles do not, however, so readily lend themselves to determining the existence of constitutionally protected liberty interests in the setting of prisoner parole. In *Meachum* v. *Fano*, *supra*, we recognized that the administrators of our penal systems need considerable latitude in operating those systems, and that the protected interests of prisoners are necessarily limited:

> "Our cases hold that the convicted felon does not forfeit all constitutional protections by reason of his conviction and confinement in prison. He retains a variety of

> important rights that the courts must be alert to protect. See *Wolff* v. *McDonnell*, 418 U. S., at 556, and cases there cited. But none of these cases reaches this one; and to hold as we are urged to do that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." 427 U. S., at 225.

We would severely restrict the necessary flexibility of prison administrators and parole authorities were we to hold that any one of their myriad decisions with respect to individual inmates may, as under the general law of contracts, give rise to protected "liberty" interests which could not thereafter be impaired without a constitutionally mandated hearing under the Due Process Clause.

The second analogy relied upon in *Sindermann* to give content to the notion of "mutually explicit understandings" was the labor law principle that the tradition and history of an industry or plant may add substance to collective-bargaining agreements. See 408 U. S., at 602. Just last Term, however, we rejected an argument that a sort of "industrial common law" could give rise to a liberty interest in the prisoner parole setting. The prisoners in *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458 (1981),[2] relying upon the

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[2] JUSTICE STEVENS' dissenting opinion appears to follow from his dissenting view in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 22 (1979) (MARSHALL, J., joined by BRENNAN and STEVENS, JJ., dissenting in part), and *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S., at 468 (STEVENS, J., dissenting). It is understandable that the distinction between *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), which involved return to custody after parole release, and *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, and *Connecticut Board of Pardons* v. *Dumschat*, *supra*, which involved prerelease expectations of parole or probation, would be thought

frequency with which the Connecticut Board of Pardons had in the past commuted and paroled life sentences, argued that the consistency of the Board's actions "'ha[d] created an unwritten *common law* of sentence commutation and parole acceleration,'" and had given rise to "'an *unspoken understanding* between the State Board [of Pardons] and inmates.'" *Id.*, at 465 (emphasis added) (quoting Brief for Respondents, O. T. 1980, No. 79–1997, pp. 17–18). We responded:

> "No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution. The ground for a constitutional claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency." 452 U. S., at 465.

Thus, this Court has recognized that the "mutually explicit understandings" of *Sindermann* have a far more useful place in determining protected property interests than in determining those liberty interests protected by the Due Process Clause of the Fourteenth Amendment.

As the majority opinion in the Court of Appeals for the Sixth Circuit observed: "Parole for Ohio prisoners lies wholly within the discretion of the OAPA. The statutes which provide for parole do not create a protected liberty interest for due process purposes." 641 F. 2d, at 414. In dissent, Judge Phillips explained:

> "In *State ex rel. Newman* v. *Lowery*, 157 Ohio St. 463, 464, 105 N. E. 2d 643 (1952), *cert. denied*, 344 U. S. 881 . . . (1952), the Supreme Court of Ohio said: 'The ques-

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"dubious" by one who dissented in the two latter cases. Nonetheless, that view was expressed in dissents from the Court's opinions in those cases and cannot be regarded as controlling here.

> tion of parole of prisoners being in the discretion of the Pardon and Parole Commission, that commission had authority to rescind its order of March 9, 1950, granting a parole effective on or after a future date.'" *Id.*, at 418.

Notwithstanding its conclusion that the granting of parole was a purely discretionary matter, the majority of the Court of Appeals in this case concluded that, once the recommendation for "shock parole" had been made, respondent was entitled to a hearing for the purpose of explaining his false statements and representations because the initial recommendation for "shock parole" gave rise to a "mutually explicit understanding." As we have previously stated, however, we deal here not with "property" interests but with "liberty" interests protected by the Fourteenth Amendment. We think that the reasoning of *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979), *Dumschat*, *supra*, and the Court of Appeals' own concession that Ohio law creates no protected "liberty" interest, require reversal of the holding of the Court of Appeals that respondent was entitled to a hearing prior to denial of his parole in June.[3]

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[3] Petitioners contend that this case is moot under *Weinstein* v. *Bradford*, 423 U. S. 147 (1975), because respondent has now been paroled. We disagree. Although it is true that respondent was released from prison in 1980, the release was conditioned upon respondent's compliance with terms that significantly restrict his freedom. For example, respondent must receive written permission before changing his residence, changing his job, or traveling out of state, must report to local law enforcement authorities at any out-of-state destination to which he travels, must not maintain a checking account, must report monthly to his parole officer, and may be imprisoned upon violation of the conditions of his parole. Affidavit in Support of Respondent's Motion to Proceed *In Forma Pauperis*. In *Weinstein*, by contrast, we noted that "respondent was temporarily paroled on December 18, 1974, and that this status ripened into a complete release from supervision on March 25, 1975. *From that date forward* it [was] plain that respondent [could] have no interest whatever in the procedures followed by petitioners in granting parole." 423 U. S., at 148 (emphasis added). Similarly, in *Jones* v. *Cunningham*, 371 U. S. 236 (1963),

The petition for certiorari is granted, the respondent's motion to proceed *in forma pauperis* is granted, and the judgment of the Court of Appeals for the Sixth Circuit is

Reversed.

JUSTICE BLACKMUN, concurring in the result.

I agree with the Court that the judgment of the Court of Appeals is to be reversed, but I am troubled by the rationale of the Court's *per curiam* opinion, and therefore I do not join it.

I would rest the reversal on the ground stated by Judge Phillips in his dissent from the judgment of the Court of Appeals, that is, on the fact that, under Ohio law, state parole authorities have the clear right to rescind a parole order be-

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where a state prisoner received conditional parole virtually identical to respondent's parole in this case, we held that the prisoner was "in custody" for purposes of federal habeas and that the Court of Appeals had erred in dismissing the appeal as moot. *Id.*, at 241–243.

The conditions of respondent's parole will last for a period of two years; thereafter he will be free from OAPA's supervision. Had OAPA not rescinded respondent's parole in 1974 it is likely that he would no longer be subject to parole restrictions on his freedom. Therefore, were we to affirm the lower court's conclusion that OAPA should not have rescinded respondent's parole without a hearing, we could remand the case with instructions that the District Court determine whether a hearing would have resulted in respondent's release in 1974. If so, the flexible nature of habeas relief would permit the District Court to order that respondent be released from the conditions under which he is now living. Indeed, in his response to the petition for certiorari, respondent affirmatively states that if the lower court's decision is affirmed he will "immediately seek release from parole." Brief in Opposition 7.

In *Vitek* v. *Jones*, 436 U. S. 407 (1978), and *Scott* v. *Kentucky Parole Board*, 429 U. S. 60 (1976), the cases cited by the dissent, we remanded so that the Courts of Appeals might consider mootness before we decided the question. In this case the Court of Appeals did consider mootness and, as the above discussion indicates, correctly concluded that a live controversy remains.

fore it becomes effective. 641 F. 2d 411, 417–418. It therefore seems to me that the Court of Appeals erred in holding that there was a mutual understanding here. Respondent's expectation of release was no more than a unilateral one and no due process rights attached. I also could hold that no mutual expectation existed under the circumstances inasmuch as the Parole Board's order was based on respondent's untruths; respondent could not reasonably believe that there was a legitimate mutual understanding that he would be released.

That, I feel, is as far as this Court needs to go. I see no reason to go further and to suggest, as the Court does, that a mutual understanding may give rise to a property interest, but not to a liberty interest. That distinction may be an appropriate one, but I am not yet prepared to say so, and I certainly am not prepared to say so on a summary reversal. *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458 (1981), does not stand for so broad a proposition, and *Morrissey* v. *Brewer*, 408 U. S. 471, 482 (1972), suggests for me that a protected liberty interest may indeed be based on a mutual understanding.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Because the facts of this case are so unusual, it is surprising that the Court considers it appropriate to grant certiorari and address the merits. It is even more surprising that the Court has decided the mootness question by adopting the reasoning that persuaded JUSTICE BRENNAN, JUSTICE POWELL, and me to dissent in *Scott* v. *Kentucky Parole Board*, 429 U. S. 60; see also *Vitek* v. *Jones*, 436 U. S. 407, 410 (STEVENS, J., dissenting). See *ante*, at 21–22, n. 3. Nevertheless, I am unable to join the Court's disposition on the merits.

The Court has fashioned a constitutional distinction between the decision to revoke parole and the decision to grant or to deny parole. Arbitrary revocation is prohibited by

Morrissey v. *Brewer*, 408 U. S. 471, whereas arbitrary denial is permitted by *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 9–11.[1] Even if one accepts the validity of that dubious distinction,[2] I believe the Court misapplies it in this case.

In the Court's view, the grant of parole creates a constitutionally protected interest in liberty that previously did not exist. Under that view, a profound change in the status of an individual occurs when he is paroled; he has greater legal rights after parole than before. The question is what event triggers this change in legal status, the act of walking through the exit gates or the State's formal decision, conveyed to the prisoner, to grant him his conditional freedom.

For the ordinary litigant, the entry of judgment by the decisionmaker—not the execution of that judgment by the sheriff—determines his legal rights. In my opinion, the interests in orderly decisionmaking that are protected by the Due Process Clause of the Fourteenth Amendment dictate a similar answer in the context of this case. As the Court has pointed out:

> "The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will

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[1] Cf. *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458 (arbitrary denial of an application for commutation of a life sentence is permissible).

[2] See *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S., at 19–20 (POWELL, J., concurring in part and dissenting in part); *id.*, at 25–29 (MARSHALL, J., dissenting in part). See also *Connecticut Board of Pardons* v. *Dumschat*, *supra*, at 470 (STEVENS, J., dissenting).

> enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Morrissey* v. *Brewer*, *supra*, at 484 (citation and footnote omitted).

It seems quite clear to me that precisely those interests are implicated by this case.

When the Ohio Adult Parole Authority revoked its decision to grant respondent parole, it acted on the basis of *ex parte* information which respondent had no opportunity to deny or to explain. Even if that information was entirely accurate in this case, and even if it was sufficiently important to justify the changed decision, the effect of the Court's holding today is to allow such decisions to stand even if wrong and wholly arbitrary. I am persuaded that such a holding is erroneous.[3]

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[3] It is a federal constitutional question whether, under all the circumstances, including the existence of rights conferred by state statutes and other rules, an individual has such a legitimate claim of entitlement to freedom that due process protections attach. In its answer to that federal question, the Court of Appeals recognized that "[p]arole for Ohio prisoners lies wholly within the discretion of the OAPA. The statutes which provide for parole do not create a protected liberty interest for due process purposes." 641 F. 2d 411, 414 (CA6 1981). But the Court of Appeals' holding was based on circumstances other than the state statutes and other rules:

"We do not reach this conclusion on the basis of cases from jurisdictions which have rules or guidelines that establish entitlement to parole or permit rescission under narrowly defined circumstances. There is no evidence that Ohio has such rules or guidelines. Nor do we base our decision on the evidence that less than one percent of Ohio's parole grants are rescinded. Cf. *Dumschat* v. *Board of Pardons*, 618 F. 2d 216 (2d Cir.), *cert. granted*, [449 U. S. 898] (1980). This evidence related to paroles generally and there was no proof directed specifically to shock parole, the comparatively new Ohio method of release involved in the present case. Rather, the decision is based on the facts of this case which lead ineluctably to the conclusion that acts of the OAPA created a protected liberty interest in Van Curen." *Id.*, at 416–417 (citations omitted).

Even if the Court correctly states that "the 'mutually explicit understandings' of *Sindermann* have a far more useful place in determining protected property interests than in determining those liberty interests pro-

If the Court had allowed the parties to argue the merits of the issue—instead of acting summarily on the basis of an incomplete presentation—the error might have been avoided. In all events, I respectfully dissent.

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tected by the Due Process Clause of the Fourteenth Amendment," *ante*, at 20, the question remains whether the act of the State in notifying the respondent that he had been granted parole as of a specific date created such a legitimate expectation of freedom as to trigger due process protections. The Court does not address that question, relying instead on the "concession [of the Court of Appeals] that Ohio law creates no protected 'liberty' interest." *Ante*, at 21. But even this Court's narrowest decisions do not limit the due process analysis to an examination of written state laws; nor do they exclude consideration of the decisions and acts of the State directed at a particular individual.

Syllabus

FEDERAL ELECTION COMMISSION *v.* DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80–939. Argued October 6, 1981—Decided November 10, 1981*

One provision of the Federal Election Campaign Act of 1971 (Act), 2 U. S. C. § 441a(d)(3), limits the amount that the national committee and state committees of a political party may spend in connection with the general election of a candidate for the United States Senate or House of Representatives. Petitioner National Republican Senatorial Committee (NRSC) is a political committee organized to support Republican candidates for the Senate. Although the Act authorizes the NRSC to contribute up to a certain amount to such candidates, it is not authorized to make expenditures on their behalf. The Federal Election Commission (FEC), however, has permitted the NRSC to act as agent of national and state party committees in making expenditures on their behalf. When certain state Republican Party committees designated the NRSC as their agent for § 441a(d)(3) expenditure purposes, the respondent Democratic Senatorial Campaign Committee filed a complaint with the FEC, asserting that the NRSC's agreements with the state committees were contrary to § 441a(d)(3). The FEC dismissed the complaint, concluding that there was "no reason to believe" that the agreements violated the Act. On review, the District Court granted the FEC's motion for summary judgment, holding that the FEC's decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The Court of Appeals reversed on the ground that the "plain language" of § 441a(d)(3) precluded the agency agreements between state committees and the NRSC.

Held: Section 441a(d)(3) does not expressly or by necessary implication foreclose the use of agency agreements, such as are at issue here, and the FEC thus acted within the authority vested in it by Congress when it determined to permit such agreements. Pp. 31–43.

(a) While § 441a(d)(3) does not authorize the NRSC to make expenditures in its own right, it does not follow that it may not act as agent of a

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*Together with No. 80–1129, *National Republican Senatorial Committee* v. *Democratic Senatorial Campaign Committee et al.*, also on certiorari to the same court.

committee that is expressly authorized to make expenditures. Nothing in the statute suggests that a state committee may not designate another committee to be its alter ego and to act in its behalf for the purposes of § 441a(d)(3). Nor does the legislative history of the Act purport to disapprove agency arrangements. Pp. 31–36.

(b) Under the standard of whether the FEC's construction of the Act was "sufficiently reasonable" to be accepted by a reviewing court, the District Court was correct in accepting the FEC's judgment. The FEC's view that the agency agreements were logically consistent with § 441a(a)(4)—which authorizes the transfer of funds among national, state, and local committees of the same party—is acceptable. And the FEC's interpretation of § 441a(d)(3) is not inconsistent with any discernible purpose of the Act. Pp. 36–42.

212 U. S. App. D. C. 374, 660 F. 2d 773, reversed.

WHITE, J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, *post*, p. 43.

Charles N. Steele argued the cause for petitioner in No. 80–939. With him on the brief was *Kathleen Imig Perkins*. *Jan W. Baran* argued the cause and filed a brief for petitioner in No. 80–1129.

Robert F. Bauer argued the cause and filed a brief for respondent Democratic Senatorial Campaign Committee.

JUSTICE WHITE delivered the opinion of the Court.

The Federal Election Campaign Act of 1971, 86 Stat. 11, as amended, 2 U. S. C. § 431 *et seq.* (1976 ed. and Supp. IV), limits the contributions that may be made to candidates or political committees in an election for federal office. One provision of the Act, § 441a(d), authorizes limited expenditures by the national and state committees of a political party in connection with a general election campaign for federal office. After authorizing such expenditures, which otherwise would be impermissible,[1] the section specifies the amount a

[1] Expenditures by party committees are known as "coordinated" expenditures and are subject to the monetary limits of § 441a(d). See 6 FEC Record, No. 11, p. 6 (Nov. 1980). Party committees are considered in-

national committee may spend in connection with a Presidential campaign, § 441a(d)(2), and limits the amount that national and state committees of a political party may spend in connection with the general election campaign of a candidate for the Senate or the House of Representatives, § 441a(d)(3). In this litigation we examine whether § 441a(d)(3) is violated when a state committee of a political party designates the national senatorial campaign committee of that party as its agent for the purpose of making expenditures allowed by the Act.

I

The National Republican Senatorial Committee (NRSC) is a political committee organized specifically to support Republican candidates in elections for the United States Senate. Although the NRSC is authorized by § 441a(h) to contribute up to $17,500 to a candidate for election to the Senate, it is not given authority by § 441a(d) to make expenditures on behalf of such candidates, and it is the position of the Federal Election Commission, the agency charged with enforcement of the Act, that the NRSC may not do so on its own account. The Commission, however, has permitted the NRSC to act as the agent of national and state party committees in making expenditures on their behalf.

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capable of making "independent" expenditures in connection with the campaigns of their party's candidates. The Commission has, by regulation, forbidden such "independent" expenditures by the national and state party committees, 11 CFR § 110.7(B)(4) (1981), and has indicated in this litigation that the congressional campaign committees fall within that prohibition. See Brief for Petitioner Federal Election Commission in No. 80–2074 (CADC), p. 10, n. 5 ("[p]arty committees . . . are deemed incapable of making independent expenditures"); Brief for Petitioner in No. 80–939, p. 38 ("NRSC is a party committee"). Thus, as the Commission admits: "Absent § 441a(d), party committees could make no expenditures whatsoever in connection with the Congressional campaigns of their party's candidates." Brief for Petitioner Federal Election Commission in No. 80–2074 (CADC), p. 10, n. 5.

In February 1977, in response to an inquiry submitted late in 1976, the Commission issued an Advisory Opinion, 1976–108, that it would be consistent with the Act for the NRSC to spend its own funds in support of congressional candidates as the designated agent of the Republican National Committee (RNC). In April 1977, the Commission issued a regulation, 11 CFR § 110.7(a)(4) (1981), which provides that the national party committees may make expenditures in the general election campaign for President "through any designated agent, including state and subordinate party committees." On the basis of this regulatory authority, the National Committee of the Democratic Party entered into an agreement specifying the Democratic Senatorial Campaign Committee (DSCC) as its agent for the expenditure of authorized funds in Senate campaigns. In 1978, certain state Republican Party committees designated the NRSC as their agent for § 441a(d)(3) expenditure purposes.[2] Complaints were filed with the Commission challenging this practice as inconsistent with the Act. In dismissing these complaints, the Commission twice ruled by unanimous votes that the agency arrangements were not forbidden by the Act. *In re National Republican Senatorial Committee*, Federal Election Commission Matter Under Review (MUR) 780 (Jan. 19, 1979); *In re National Republican Senatorial Committee*, Federal Election Commission MUR 820 (June 17, 1979). In 1980, certain state committees again designated the NRSC as their agent, and on May 19, the DSCC filed its complaint with the Commission asserting that the NRSC's agreements with the state committees were contrary to § 441a(d)(3). The complaint did not challenge the contemporaneous agency agreement under which the NRSC acted as the agent of the RNC in connection with the latter's expenditures under § 441a(d).

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[2] In the 1978 senatorial elections, the NRSC spent a total of $2,770,995 under the combined spending authority of the national and state party committees. Jt. App. in No. 80–2074 (CADC), p. 105.

After considering the report of its General Counsel, the Commission unanimously dismissed the complaint, concluding that there was "no reason to believe" that the agreements violated the Act.

The DSCC petitioned for review in the District Court for the District of Columbia pursuant to § 437g(a)(8).[3] That court granted the Commission's motion for summary judgment, concluding that the decision of the Commission was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Democratic Senatorial Campaign Committee* v. *Federal Election Comm'n*, No. 80–1903 (DC Aug. 28, 1980) (reprinted at App. to Pet. for Cert. of NRSC B4). On appeal, the Court of Appeals for the District of Columbia Circuit granted the NRSC leave to intervene and reversed the judgment of the District Court after concluding that the "plain language of Section 441a(d)(3) precludes" the agency agreements between state committees and the NRSC. 212 U. S. App. D. C. 374, 383, 660 F. 2d 773, 782. We granted the petitions for certiorari filed by the Commission and the NRSC, 450 U. S. 964 (1981), and we now reverse the judgment of the Court of Appeals.

II

Although the Court of Appeals first addressed whether and to what extent it should defer to the Commission's construction of the Act, 212 U. S. App. D. C., at 377, 660 F. 2d, at 776, this discussion and the conclusion that little or no deference was due the Commission were pointless if the court was correct that the agency agreements violated the plain language of the Act as well as the statutory purposes revealed by the legislative history. The interpretation put

[3] This section provides that "[a]ny party aggrieved" by the Commission's dismissal of a complaint may petition the United States District Court for the District of Columbia which "may declare that the dismissal of the complaint or the action, or the failure to act, is contrary to law" and order the Commission to conform with the court's declaration.

on the statute by the agency charged with administering it is entitled to deference, *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965), but the courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement. *SEC* v. *Sloan*, 436 U. S. 103, 118 (1978); *FMC* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 745–746 (1973); *Volkswagenwerk* v. *FMC*, 390 U. S. 261, 272 (1968); *NLRB* v. *Brown*, 380 U. S. 278, 291 (1965). Accordingly, the crucial issue at the outset is whether the Court of Appeals correctly construed the Act. For the reasons that follow, we disagree with the Court of Appeals. As we understand the Act and its legislative history, § 441a(d)(3) does not foreclose the use of agency agreements. The Commission thus acted within the authority vested in it by Congress when it determined to permit such agreements.

Section 441a(d)(3) provides as follows:

> "The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditures in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—
>
> "(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—
>
> "(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
>
> "(ii) $20,000; and
>
> "(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000."

It is evident from its terms that the section does not in so many words forbid the state or national party to designate agents for expenditure purposes. This much is common ground. The Court of Appeals, however, held that because § 441a(d)(3) permits expenditures in congressional campaigns to be made by national and state committees of the political parties, including subordinate committees of the latter, and because the NRSC was neither a national committee[4] nor a state committee, it should not be permitted to make expenditures under any arrangement "by which the special authority of a named entity is transferred to another." 212 U. S. App. D. C., at 380, 660 F. 2d, at 779. Obviously, § 441a(d)(3) does not permit the NRSC to make expenditures in its own right. But, contrary to the Court of Appeals, it does not follow that the NRSC may not act as an agent of a committee that is expressly authorized to make expenditures. In the nature of things, a committee must act through its employees and agents, as the Court of Appeals recognized, and nothing in the statute suggests that a state committee may not designate another committee to be its alter ego and to act in its behalf for the purposes of § 441a(d)(3). To foreclose such an arrangement on the grounds that the named agent is not one of the authorized spenders under § 441a(d)(3) would foreclose all agency agreements regardless of the identity of the agent and regardless of the terms of the agency.[5] Nothing in the Act demands that the choices available to the state committee should be so severely restricted.

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[4] The RNC, not the NRSC, is the "national committee" as defined by 2 U. S. C. § 431(14) (1976 ed., Supp. IV): "the organization . . . responsible for the day-to-day operation of such political party at the national level."

[5] The Court of Appeals' suggests that it is misleading to characterize the agreements as ones of "agency" because the state committees do not direct how funds are to be raised and spent. We do not understand the lack of such control to be inherent in these arrangements, nor dispositive in deciding whether such agreements can be made under the Act. See *infra*, at 41. See also n. 6, *infra*.

If the Court of Appeals is correct that any arrangement is forbidden by which an authorized committee empowers another to exercise its spending authority, then neither of the national committees could legally enter into agency relationships with its congressional campaign committees. Yet, both have regularly done so, and respondent DSCC does not challenge these arrangements. Indeed, the DSCC accepts the Commission's regulation, 11 CFR § 110.7 (1981),[6] as valid and interprets that regulation as authorizing the agency agreements which have existed between the parties' national committees and the Republican and Democratic Senatorial Campaign Committees.[7] Moreover, when the Commission, as required by law,[8] submitted the regulation to Congress, neither House expressed disapproval.

Despite this indication that Congress does not look unfavorably upon the NRSC's sharing in the spending authority

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[6] The regulation, 11 CFR § 110.7(a)(1) (1981), allows the "national committee of a political party [to] make expenditures in connection with the general election campaign of any candidate for President . . . affiliated with the party," up to "an amount equal to 2 cents multiplied by the voting age population of the United States," the amount authorized by § 441a(d)(2). These expenditures may be made "through any designated agent, including State and subordinate committees." The regulation goes on to authorize the national committee to make expenditures on behalf of congressional and senatorial candidates of the party.

While the regulation directly authorizes transfers of spending authority only with respect to Presidential campaign expenditures, the significance of the regulation is that it clearly demonstrates that § 441a(d) expenditures do not have to be made directly by the committee specified in the statute.

[7] In its brief before the Court of Appeals, the DSCC expressly stated that it "does not challenge this regulation or the NRSC's role as agent of the Republican National Committee." See Brief for Appellant DSCC in No. 80–2074 (CADC), p. 20, n. 16.

[8] The Act requires that before prescribing any rule or regulation the Commission shall transmit the proposed rule and an accompanying statement to the Senate and the House. If neither House disapproves the proposed rule within 30 legislative days, the Commission may proceed to issue the rule. § 438(d).

of § 441a(d)(3), the Court of Appeals reads such disapproval into Congress' failure to explicitly provide for such arrangements. To bolster its argument, the court points to § 441a(h),[9] which directly authorizes the national party committees, including the Republican or Democratic Senatorial Campaign Committees, to contribute up to $17,500 to a senatorial candidate. This argument, if accepted, would only underline that the NRSC may not make additional expenditures on its own account. It does not answer the question whether a state committee may exercise its statutory spending authority by designating the NRSC as its agent for this purpose.[10]

Neither does the legislative history of the Act purport to disapprove agency arrangements. The Court of Appeals refers to the defeat of the Brock Amendment, which would have exempted congressional campaign committees such as the NRSC from the Act's expenditure limits.[11] 212 U. S. App. D. C., at 381, 660 F. 2d, at 780. But rejection of a proposal to permit congressional campaign committees to make expenditures in their own right does not necessarily affect their capacity to perform agency functions. Moreover, insofar as the intent of Congress is reflected in its failure to adopt a proposed amendment, a contrary—and indeed stronger—inference can be found in the rejection by the 96th Congress of an amendment that would have expressly

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[9] Section 441a(h) authorizes the "Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees" to contribute "not more than $17,500" to a senatorial candidate.

[10] By its terms, the provision does not restrict a senatorial campaign committee from making expenditures on behalf of other committees.

[11] During the 1974 legislative debates, Senator Brock proposed an amendment that would have exempted congressional campaign committees from the expenditure limitations of the Act. 120 Cong. Rec. 9549–9551 (1974). The Senate initially adopted the amendment, but reversed itself five days later. *Id.*, at 10062–10064.

prohibited the movement of funds between state and national committees of a political party.[12]

It is clear enough to us without saying more that the statute does not expressly or by necessary implication foreclose the agency agreements at issue in this case. But neither does it expressly permit or require such agreements. If this were a direct enforcement action rather than the review of a decision by the administrative agency charged with the enforcement of the statute, it may be that a court could defensibly arrive at the conclusion that agency agreements of this kind should be forbidden. It may also be that the Commission could have construed the statute to forbid the agreements and that a court would have accepted such a construction by the agency. But that is not this case. The Commission, in dismissing the DSCC's complaint, has determined that agency agreements are not contrary to law and the question is whether the courts should defer to this judgment as a permissible construction of the Act or instead disregard the agency's view and proceed to construe the statute based on its own view of what would best serve the purpose and policy of the Act.

III

The Court of Appeals determined that the Commission's construction of the Act was entitled to no deference whatso-

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[12] Section 113 of H. R. 11315 would have prohibited any "movement of funds" between "the political committees of a national political party (including House and Senate congressional campaign committees of such party) and the political committees of a State committee of a political party . . . for the purpose of making contributions to, or expenditures on behalf of, any candidate for Federal office." H. R. 11315, 95th Cong., 2d Sess. (1978). The House rejected a rule for consideration of the bill, 124 Cong. Rec. 7872–7880 (1978). The basis for the rejection may be seen in various comments attacking the bill. Representative Stockman saw the proposed amendment as a "fundamental assault on . . . the continued meaningful role of our political parties." *Id.*, at 7875. Representative Mikva stated that he "deeply regret[ted] that the committee . . . saw fit to change the party financing." *Id.*, at 7876.

ever. While acknowledging that deference is often appropriately given to an agency's interpretation of its governing statute, the court refused to accord that deference here because of what it perceived as the lack of a reasoned and consistent explanation by the Commission in support of its decision. We agree that the thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling. See *Adamo Wrecking Co.* v. *United States*, 434 U. S. 275, 287, n. 5 (1978); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). We do not agree, however, that the Commission failed to merit that deference in this case.

Initially, we note that the Commission is precisely the type of agency to which deference should presumptively be afforded. Congress has vested the Commission with "primary and substantial responsibility for administering and enforcing the Act," *Buckley* v. *Valeo*, 424 U. S. 1, 109 (1976), providing the agency with "extensive rulemaking and adjudicative powers." *Id.*, at 110. It is authorized to "formulate general policy with respect to the administration of this Act," § 437d(a)(9), and has the "sole discretionary power" to determine in the first instance whether or not a civil violation of the Act has occurred. 424 U. S., at 112, n. 153. Moreover, the Commission is inherently bipartisan in that no more than three of its six voting members may be of the same political party, § 437c(a)(1), and it must decide issues charged with the dynamics of party politics, often under the pressure of an impending election. For these reasons, Congress wisely provided that the Commission's dismissal of a complaint should be reversed only if "contrary to law." § 437g(a)(8).

The Commission's position on the question before us is clear. Since 1976, it consistently has adhered to its construction of § 441a(d)(3) as not forbidding intraparty agency agreements. The Commission has on three separate occasions, all by unanimous votes, rejected the DSCC's claim.

On each occasion the Commission followed the recommendation of its General Counsel. In his first report,[13] the General Counsel emphasized the absence of any specific statutory prohibition of the agency arrangements, and also relied on § 441a(a)(4),[14] which permits unlimited transfer of funds among state and national political committees of the same party. The second report,[15] without rejecting any of the earlier arguments, also drew support from a Commission regulation approving similar agency agreements between national level committees.[16] The third report,[17] issued in this case, added an analysis of § 441a(d)(3), reviewed the legislative history, and took note of the fact that Congress had recently amended the Act with knowledge of the Commission's construction of § 441a(d)(3) and had let that construction stand. Unlike the Court of Appeals, we find the differences in emphasis in the three reports of little significance. All reach the same conclusion, none rejects the arguments of the others.[18] The Commission consistently has upheld the agency agreements; the fact that Commission Counsel has had the luxury of a number of sound arguments on which to base his opinions does not detract from the deference due the agency's interpretations.[19]

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[13] See First General Counsel's Report, MUR 780 (Jan. 19, 1978).

[14] This section provides that the limitations on contributions to and by political committees found in §§ 441a(a)(1) and (2) "do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party."

[15] See First General Counsel's Report, MUR 820 (June 19, 1978).

[16] See 11 CFR § 110.7 (1981), *supra* n. 6.

[17] See First General Counsel's Report, MUR 1234 (July 11, 1980).

[18] The assertion by the Court of Appeals that the Commission has disavowed the relevance of 11 CFR § 110.7 (1981) in its brief before that court, 212 U. S. App. D. C. 374, 378, 660 F. 2d 773, 777, is belied by its incorporation in the Commission's brief before this Court. See Brief for Petitioner in No. 939, p. 35.

[19] Nor does the fact that the Commission, following its customary prac-

Hence, in determining whether the Commission's action was "contrary to law," the task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court. *Train* v. *Natural Resources Defense Council*, 421 U. S. 60, 75 (1975); *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978). To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. *Ibid.*; *Udall* v. *Tallman*, 380 U. S., at 16; *Unemployment Compensation Comm'n* v. *Aragon*, 329 U. S. 143, 153 (1946). Under this standard, we think the District Court was correct in accepting the Commission's judgment.

As we have said, § 441a(d) does not expressly or by implication forbid agency agreements. Although the Court of Appeals and the DSCC are of the view that since the section specifically authorized only two committees—the national and state party committees—to make campaign expenditures, no other committee could make such expenditures either on its own account or on behalf of others. But the opposite reading makes equal sense: Congress, having written the statute so precisely, would have made clear that expendi-

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tice, did not expressly adopt the General Counsel's report in announcing its decision "depriv[e] a reviewing court of any Commission record on which to base a deferential consideration." 212 U. S. App. D. C., at 378, n. 3, 660 F. 2d, at 777, n. 3. The Court of Appeals previously has held that the General Counsel's report to the Commission is sufficient to support the Commission's dismissal of a complaint. See *Hampton* v. *Federal Election Comm'n*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036, pp. 50,439–50,440 (DC 1977), aff'd No. 77–1546 (CADC July 21, 1978). In this case, the General Counsel's report was made public simultaneously with the Commission's ruling. It was the third occasion on which the Commission followed the General Counsel's advice in this matter. Even without an express statement, it is sufficiently clear that the staff report provides the basis for the Commission's action.

tures by other committees, whether by agency or otherwise, were prohibited.

We also find acceptable the Commission's view that the agency agreements were logically consistent with § 441a (a)(4). That section authorizes the transfer of funds among national, state, and local committees of the same party. There can be little question but that the section applies to the National Republican Senatorial Committee, as that Committee is part of the Republican Party organization.[20] Under that provision, by using direct money transfers, instead of an agency agreement, the national committee could write a check to the state committee for the same amount that it would otherwise have spent directly under the agency agreement. That being so, we agree with the dissent below that the difference is "purely one of form, not substance." 212 U. S. App. D. C., at 386, 660 F. 2d, at 785.

Money transferred to the state committee presumably would be spent as the state committee decided. Agency

[20] Section 441a(a)(4) applies to "political committees which are national, state, district or local committees (including any subordinate committee thereof) of the same political party." The DSCC does not challenge the applicability of the transfer provision to national senatorial committees. At one point, the Court of Appeals refused to address the issue for that reason. See 212 U. S. App. D. C., at 382, 660 F. 2d, at 781 (the "issue was not joined before this court"). At another point, however, the court expressed "some doubt" whether § 441a(a)(4) encompasses congressional committees. Surely that doubt must be minimal in light of the broad scope of the statutory language, the fact that senatorial campaign committees are identifiable as part of their respective party. See Cong. Rec. 9552 (1974) (remarks of Sen. Baker), and the Congress' clear intent to include such committees within the scope of §§ 441a(a)(1)–(2), to which § 441a(a)(4) serves as an exception. See H. R. Conf. Rep. No. 94–1057, p. 58 (1976) ("the term 'political committee established or maintained by a national political party' includes the Senate and House Campaign Committees"). A committee "established or maintained" by a national party would appear to fall squarely within the reach of § 441a(a)(4). Indeed, if congressional campaign committees were not considered as part of the national party, their ability to make independent expenditures would seem to escape any limitation prescribed by the Act. See n. 1, *supra*.

agreements, by comparison, might allow the NRSC to determine what expenditures to make on behalf of the state committees. The Court of Appeals made much of this, asserting that the agency arrangements, unlike § 441a(a)(4) transfers, reduced the state committees to "legal shells." The court overlooks that the NRSC easily could insist that funds transferred to a state committee be utilized in a certain manner. Conversely, state committees could retain or share control over how § 441a(d)(3) spending authority is exercised by writing conditions into the agency agreement. More fundamentally, state committees are not obligated to enter into agency agreements in the first place. The delegation of spending authority is an option, not a requirement, and it is an option resting entirely with the state committees.

Finally, the Commission's interpretation is not inconsistent with any discernible purpose of the Act. In *Buckley* v. *Valeo*, we recognized that the primary interest served by the Act is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office. 424 U. S., at 25. It has not been suggested that this basic purpose of the Act is compromised by agency arrangements. Since the limitations on the amount that can be spent under the Act apply with equal force whether a state committee exercises its authority directly or transfers it to one of the party's national committees, an agency arrangement does not permit the expenditure of a single additional dollar.

Section 441a(d)(3) fits into the general scheme by assuring that political parties will continue to have an important role in federal elections.[21] Although the DSCC would transform this purpose into the more specific objective of stimulating political parties at the state level, none of the limited legisla-

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[21] See S. Rep. No. 93–689, p. 7 (1974), reprinted in Legislative History of the Federal Election Campaign Act Amendments of 1974, p. 103 (1977).

tive history concerning the provision supports this view.[22] The legislative discussion of preserving a role for political parties did not differentiate between the state and national branches of the party unit. It is hardly unreasonable to suppose that the political parties were fully capable of structuring their expenditures so as to achieve the greatest possible return. Agency agreements may permit all party committees to benefit from fundraising, media expertise, and economies of scale. In turn, effective use of party resources in support of party candidates may encourage candidate loyalty and responsiveness to the party. Indeed, the very posture of these cases betrays the weakness of respondent's argument—an argument that, at bottom, features one of the two great American political parties insisting that its rival requires judicial assistance in discovering how a legislative enactment operates to its benefit.

Thus, the absence of a prohibition on the agency arrangements at issue, the lack of a clearly enunciated legislative purpose to that effect, and indeed, the countervailing existence of a transfer mechanism whose presence is difficult to reconcile with the interpretation urged by the Court of Appeals, prevent us from finding that the Commission's deter-

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[22] It should be remembered that the section was considered at a time when Congress contemplated total public funding of general election campaigns for federal office. See § 101, S. 3044, 93d Cong., 2d Sess., 71–78 (1974). In that context, statements in Congress about the need to preserve the role of party committees, see, *e. g.*, 120 Cong. Rec. 34372 (1974) (remarks of Sen. Cannon); *id.*, at 35136 (remarks of Rep. Frenzel), are properly read as expressing concern over the function of political parties under public campaign finance rather than concern with the role of state committees vis-à-vis party committees at the national level. Thus, by allowing for the pooling of campaign funds, agency agreements increase party resources "to conduct *party-wide* election efforts." S. Rep. No. 93–689, *supra*, at 8, reprinted in Legislative History of the Federal Election Campaign Act Amendments of 1974, *supra*, at 104.

mination was "contrary to law." Therefore, the judgment of the Court of Appeals is

Reversed.

JUSTICE STEVENS, concurring.

The issue presented in this case is whether the National Republican Senatorial Committee (NRSC) violated the Federal Election Campaign Act, 2 U. S. C. § 441 *et seq.* (1976 ed. and Supp. IV), by making expenditures that state political committees are authorized to make under § 441a(d)(1). Section 441a(d)(1) authorizes "the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee," to make certain expenditures in connection with a candidate's general election campaign, subject to defined limitations. See § 441a(d)(3). Since the NRSC clearly is not "the national committee of a political party,"[1] or "a State committee of a political party, including any subordinate committee of a State committee,"[2] it is clear that nothing in § 441a(d)(3) limits the permissible expenditure of funds by the NRSC.

The NRSC is, however, a "political committee" as that term is defined in the statute.[3] Section 441a(a)(2)(A) pro-

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[1] Section 431(14) defines the term "national committee" as "the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission." 2 U. S. C. § 431(14) (1976 ed., Supp. IV).

[2] Section 431(15) defines the term "State committee" as "the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission." 2 U. S. C. § 431(15) (1976 ed., Supp. IV).

[3] Section 431(4) defines the term "political committee" as—

"(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year . . . ." 2 U. S. C. § 431(4) (1976 ed., Supp. IV).

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vides that no multicandidate political committee may make contributions to a candidate that exceed $5,000.[4] Section 441a(h) provides, however, that "amounts totaling not more than $17,500 may be contributed to a candidate for nomination for election, or for election, to the United States Senate during the year in which an election is held in which he is such a candidate, by the Republican or Democratic Senatorial Campaign Committee . . . ." No section of the statute directly limits *expenditures* by the Republican or Democratic Senatorial Campaign Committees.[5] However, § 441a(a)(7)(B)(i) provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate."

Thus, the only way that the NRSC could be said to have violated the statute in this case is if it made expenditures "in cooperation, consultation, or concert" with a candidate that exceeded $17,500. The record discloses that the NRSC in several instances made expenditures that exceeded $17,500. As I understand the record, however, it does not demonstrate that these expenditures were made in cooperation, consultation, or concert with the candidates. The record simply is silent on this point.

The only way that the NRSC could be said to have violated the statute, therefore, is if, as a matter of law, it is *incapable* of making expenditures that are not made in cooperation,

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[4] Section 441a(a)(2)(A) provides:

"No multicandidate political committee shall make contributions—

"(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000." 2 U. S. C. § 441a(a)(2)(A).

[5] The Act carefully distinguishes between "contributions" and "expenditures." See § 431(8) (defining the term "contribution"); § 431(9) (defining the term "expenditure").

consultation, or concert with a candidate. In other words, the NRSC could not be said to have violated the statute unless the NRSC is deemed as a matter of law to be an agent of the candidate on whose behalf it expends funds. If this is the case, however, it would appear to me to follow almost automatically that the NRSC may act as an agent for the state committees in spending the amounts that state committees are authorized to spend by § 441a(d), since state committees are largely controlled by the state candidates that they serve. It would seem incongruous to hold that the NRSC *must* be treated as an agent of a candidate when it makes expenditures, but *may not* act as a lawful agent of that candidate's state committee.

I concur fully in the conclusion of the Court that the agency relationship utilized in this case does not violate the Act, and I join its opinion subject only to the caveat that I am not entirely sure that the expenditures at issue in this case "otherwise would be impermissible," *ante*, at 28, and n. 1. I assume, *arguendo*, that this is so, for otherwise petitioners would bear absolutely no burden to justify the expenditures made in this case.[6]

[6] Moreover, this case would have been much easier for me to decide if the parties had begun their presentations with an appropriate explanation of the relevant provisions of the statute instead of an unstated assumption that is not entirely obvious.

RIDGWAY ET AL. *v.* RIDGWAY ET AL.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

No. 80–1070. Argued October 7, 1981—Decided November 10, 1981

When Army Sergeant Ridgway and his first wife, April, were granted a divorce by a Maine court, the decree, *inter alia*, ordered Ridgway to keep in force the insurance policies on his life then outstanding for the benefit of the Ridgways' three children. At the time of the divorce, the sergeant's life was insured under a $20,000 policy issued by petitioner Prudential Insurance Co. of America (Prudential) pursuant to the Servicemen's Group Life Insurance Act of 1965 (SGLIA), and April was the designated beneficiary. Subsequently, Ridgway married petitioner Donna, and changed the policy's beneficiary designation to one directing that the proceeds be paid as specified "by law," which meant that under the SGLIA the proceeds would be paid to the insured's "widow," *i. e.*, his "lawful spouse . . . at the time of his death." Thereafter, Ridgway died, survived by Donna as his lawful wife. After April and Donna had both filed claims to the policy proceeds, April instituted suit in Maine Superior Court against Prudential, seeking to enjoin payment of the proceeds to Donna and to obtain a declaratory judgment that the proceeds were payable to the children under the divorce decree. Donna joined the suit as a plaintiff asserting a claim to the proceeds based on the beneficiary designation and her status as Ridgway's widow. April filed a cross-claim, praying for the imposition of a constructive trust for the children's benefit on any proceeds paid to Donna. The Superior Court rejected April's claims, taking the view that a constructive trust would interfere with the operation of the SGLIA and thus would run afoul of the Supremacy Clause. The Maine Supreme Judicial Court vacated the dismissal of April's cross-claim, and remanded with directions to enter an order naming Donna as constructive trustee of the policy proceeds.

Held: The insured's beneficiary designation under the SGLIA policy prevails over the constructive trust imposed upon the policy proceeds by the state court. Pp. 53–63.

(a) As a consequence of the Supremacy Clause, a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments. Here, the provisions of the SGLIA according the insured service member the right freely to designate the beneficiary and to alter that choice at any time by

communicating the decision in writing to the proper office prevail over and displace inconsistent state law. *Wissner* v. *Wissner*, 338 U. S. 655, controlling; *Yiatchos* v. *Yiatchos*, 376 U. S. 306, distinguished. Pp. 53–60.

(b) The imposition of a constructive trust upon the insurance proceeds is also inconsistent with the provision of the SGLIA which, in addition to exempting policy proceeds "from the claims of creditors," prohibits any "attachment, levy, or seizure by or under any legal or equitable process whatever," whether accomplished "either before or after receipt by the beneficiary." Any diversion of the proceeds of the policy by means of a court-imposed constructive trust would operate as a forbidden "seizure" of those proceeds. Pp. 60–61.

419 A. 2d 1030, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and MARSHALL, JJ., joined. POWELL, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 64. STEVENS, J., filed a dissenting opinion, *post*, p. 71. O'CONNOR, J., took no part in the consideration or decision of the case.

Stephen P. Beale argued the cause for petitioners. With him on the briefs were *Robert Checkoway* and *Peter M. Garcia*.

Curtis Webber, by appointment of the Court, 451 U. S. 905, argued the cause and filed a brief for respondents.

Joshua I. Schwartz argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General McCree, Acting Assistant Attorney General Martin, Deputy Solicitor General Geller, William Kanter*, and *Howard S. Scher*.

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether an insured serviceman's beneficiary designation under a life policy issued pursuant to the Servicemen's Group Life Insurance Act of 1965 (SGLIA), Pub. L. 89–214, 79 Stat. 880, prevails over a constructive trust imposed upon the policy proceeds by a state-court decree.

I

The Facts

Richard H. Ridgway was a career sergeant in the United States Army. April D. Ridgway was his wife. Richard and April were the parents of three children, Hayley, Laurie, and Brady, all minors. The Ridgways' marriage, however, ended with a divorce granted by a Maine court on December 7, 1977. The state divorce judgment, entered on April's complaint and apparently following property settlement negotiations, ordered Richard, among other things, to pay specified amounts monthly for the support of the three children. App. 13. It also ordered him

> "to keep in force the life insurance policies on his life now outstanding for the benefit of the parties' three children. If any of such insurance policies should subsequently be terminated for any reason, defendant shall immediately replace it with other life insurance of equal amount for the benefit of the children." *Id.*, at 14.

Sergeant Ridgway's life was then insured under a $20,000 policy issued by Prudential Insurance Company of America pursuant to a group contract with the Administrator of Veterans' Affairs. At the time of the Ridgways' divorce, April was the designated beneficiary of that policy.

On March 28, 1978, less than four months after the divorce, Ridgway married his second wife, Donna, the individual petitioner here. Six days later, the sergeant, as insured, changed the policy's beneficiary designation to one directing that its proceeds be paid as specified "by law." This referred to the statutory order of beneficiary precedence set forth in 38 U. S. C. §770(a). See also 38 CFR §9.16(i) (1980). Under that statutory prescription, the policy proceeds, in the event of Ridgway's death, would be paid to his

"widow," that is, his "lawful spouse . . . at the time of his death." 38 U. S. C. § 765(7).

Sergeant Ridgway died on January 5, 1979. Donna survived him and was his lawful wife at the time of his death. Both April and Donna filed claims for the proceeds of the policy. April based her claim, which was on behalf of the children, on the divorce decree. Donna's claim rested on the beneficiary designation and her status as Ridgway's widow.

April thereafter instituted the present suit in the Superior Court for Androscoggin County, Me. As legal representative of the three minor children, she sued Prudential, seeking both to enjoin the payment of the policy proceeds to Donna, and to obtain a declaratory judgment that those proceeds were payable to the children. Donna joined the litigation and was aligned as a plaintiff asserting a claim to the proceeds. April then filed a cross-claim against Donna, praying for the imposition of a constructive trust, for the benefit of the children, on any policy proceeds paid to Donna. Prudential supported Donna's position.

The Superior Court rejected April Ridgway's claims. It acknowledged that the terms of the judgment of divorce and the beneficiary designation were inconsistent.[1] But it felt that the imposition of a constructive trust would interfere with the operation of the federal SGLIA, and that such a disposition would therefore run afoul of the Supremacy Clause, U. S. Const., Art. VI, cl. 2. App. 38–43.

On the ensuing appeal to the Supreme Judicial Court of Maine, the parties stipulated, inasmuch as the policy proceeds by that time had been deposited in court, that the sole

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[1] The Superior Court observed that the "agreement embodied in the divorce decree is valid," and it opined that the decree "would appear to give [April] a cause of action, on behalf of her children, against the estate of her former husband," App. 42, citing *Stratton* v. *Servicemen's Group Life Ins. Co.*, 422 F. Supp. 1119 (SD Iowa 1976). See *id.*, at 1122.

issue was "[w]hether or not the presiding justice erred in ruling that, on the basis of the facts found, he could not impose a constructive trust on the proceeds of Sergeant Ridgway's insurance." *Id.*, at 48. That court, sympathetic to April, vacated the Superior Court's dismissal of her cross-claim, and remanded the case with directions to enter an order naming Donna as constructive trustee of the policy proceeds. The Court Clerk, who held the proceeds, was directed to pay them to April for and on behalf of the three children. *Ridgway* v. *Prudential Ins. Co. of America*, 419 A. 2d 1030, 1035 (1980).

We granted certiorari, 450 U. S. 979 (1981), to review the important issue presented by the case.

II

The Statutory Background

In order to make life insurance coverage available to members of the uniformed services on active duty, particularly in combat zones, Congress in 1965 enacted the SGLIA. See H. R. Rep. No. 1003, 89th Cong., 1st Sess., 7 (1965). The impetus for the legislation was the escalating level of hostilities and casualties in the then ongoing Vietnam conflict; this had prompted private commercial insurers to restrict coverage for service members.[2] See 111 Cong. Rec. 24339 (1965) (remarks of Rep. Teague, Chairman of the House Committee on Veterans' Affairs); see also S. Rep. No. 619, 89th Cong., 1st Sess., 3 (1965). The earlier program of federally sponsored life insurance for service members, see National Service Life Insurance Act of 1940, 54 Stat. 1008, and National Service Life Insurance Act of 1958, as amended, 38 U. S. C. § 701 *et seq.* (NSLIA), placed in effect shortly before the involvement of this country in World War II, had been allowed

[2] The very title of the Act recited that it was "to provide special indemnity insurance for members of the Armed Forces serving in combat zones, and for other purposes." 79 Stat. 880.

to lapse after the end of the Korean hostilities when commercial insurance generally became available to service members.[3] Accordingly, NSLIA coverage could not be obtained by many service members on active duty in 1965. See 111 Cong. Rec. 24339 (1965) (remarks of Rep. Teague).

Although its purposes and provisions resemble those of the NSLIA in many respects, the SGLIA differs from the predecessor program in that it directs the Administrator of Veterans' Affairs to purchase coverage from one or more qualified commercial insurers instead of offering coverage by the United States itself. See 38 U. S. C. § 766. Thus, under the SGLIA, the Government is the policyholder, rather than the insurer. The Administrator has contracted with petitioner Prudential Insurance Company of America, which now serves as the primary insurer under the SGLIA and which operates, under Veterans' Administration supervision and pursuant to 38 U. S. C. § 766(b), the Office of Servicemen's Group Life Insurance in Newark, N. J.

The SGLIA initially provided insurance only for members serving in specified services. 79 Stat. 880. The maximum coverage allowed was then $10,000. *Id.*, at 881. Since 1965, however, statutory changes have expanded both eligibility for coverage and the amount of insurance available.[4] The program is operated on a presumptive enrollment basis; coverage is provided automatically and premiums are withheld from the service member's pay, unless the insurance is expressly declined or is terminated by written election. 38 U. S. C. §§ 767(a) and 769.[5]

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[3] A similar and still earlier program of United States Government, or War Risk, Insurance, was in effect for the World War I period. War Risk Insurance Act of Oct. 6, 1917, § 400, 40 Stat. 409. See *United States* v. *Williams*, 302 U. S. 46 (1937).

[4] See Pub. L. 91–291, §§ 1 and 2, 84 Stat. 326–327; Pub. L. 92–315, 86 Stat. 227; Pub. L. 93–289, 88 Stat. 165, 166, 169.

[5] The Solicitor General states that 99.6% of all active duty personnel and 97.9% of the Ready Reservists are enrolled in the program. Brief for

In order to make the insurance available through a commercial carrier at a reasonable rate, notwithstanding the special mortality risks that service members often must assume, Congress undertook to subsidize the program. See S. Rep. No. 91–398, p. 2 (1969). A sum representing the extra premium for special mortality risks is periodically deposited by the United States into a revolving fund that is used to pay premiums on the master policy. See 38 U. S. C. §§ 769(b) and (d)(1). The fund otherwise is derived primarily from deductions withheld from service members' pay. §§ 769(a)(1) and (d)(1). Accordingly, depending upon the conditions faced by service members at any given time, the program may be financed in part with federal funds. See S. Rep. No. 91–398, at 2.

The SGLIA establishes a specified "order of precedence," 38 U. S. C. § 770(a), for policy beneficiaries. By this statutory provision, the proceeds of a policy are paid first to such "beneficiary or beneficiaries as the member . . . may have designated by [an appropriately filed] writing received prior to death." If there be no such designated beneficiary, the proceeds go to the widow or widower of the service member or, if there also be no widow or widower, "to the child or children of such member . . . and descendants of deceased children by representation." Parents, and then the representative of the insured's estate (an obvious bow at this point in the direction of state law), are next in order. *Ibid.* See also 38 CFR § 9.16(i) (1980).

In 1970, by Pub. L. 91–291, § 5, 84 Stat. 330, Congress added an anti-attachment provision. With certain exceptions not applicable here, this provision shields payments made under § 770(a) "from taxation" and from "claims of creditors," and states that the payments "shall not be liable to attachment, levy, or seizure by or under any legal or equitable

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United States as *Amicus Curiae* 5. See also S. Rep. No. 91–398, p. 2 (1969).

process whatever, either before or after receipt by the beneficiary." § 770(g).

Pursuant to his general rulemaking authority over veterans' programs, § 210(c)(1), the Administrator has promulgated regulations implementing the SGLIA. These provide that the insured "may designate any person, firm, corporation or legal entity" as a policy beneficiary, and any such "designation or change of beneficiary . . . will take effect only if it is in writing, signed by the insured and received [by the appropriate office] prior to the death of the insured." 38 CFR §§ 9.16(a) and (d) (1980). A change of beneficiary "may be made at any time and without the knowledge or consent of the previous beneficiary." § 9.16(e). And "[n]o change or cancellation of beneficiary . . . in a last will or testament, or in any other document shall have any force or effect unless such change is received by the appropriate office." § 9.16(f).

III

The foregoing description of the statutory plan adopted by Congress, and implemented by the Administrator's regulations, demonstrates the pervasive and detailed characteristics of the congressional specifications. The obvious and stated concern of Congress was to provide coverage for the member, no matter how hazardous the duty, and thus protection for the member's designated beneficiaries. The legislation itself says nothing about contrary dictates of state law or state judgments.

The Supreme Judicial Court of Maine, however, concluded that the order of beneficiary precedence set forth in 38 U. S. C. § 770(a) "does not reflect any federal interest in permitting a serviceman to evade the responsibility to provide for his minor children imposed both by virtue of his voluntary agreement and by the express provision of a valid state court decree." 419 A. 2d, at 1033. That court further concluded that the anti-attachment provision, § 770(g), "has no application to the instant case since its purpose is to protect the pro-

ceeds of the insurance from the claims of creditors." It pointed out that it was concerned "not with the claim of a creditor but with the claims of minor children who assert an equitable interest in the proceeds arising from their deceased father's voluntary agreement and a valid judicial decree." Thus, it said, the accomplishment of the objectives of the federal statute "is neither obstructed nor interfered with by imposing a constructive trust on the insurance proceeds." *Ibid.*

We forthwith acknowledge, of course, that this Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945). It follows that the decision of the Supreme Judicial Court of Maine is subject to disturbance here only to the extent that it fails to honor federal rights and duties.

Notwithstanding the limited application of federal law in the field of domestic relations generally, see *McCarty* v. *McCarty*, 453 U. S. 210, 220 (1981); *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 581 (1979); *In re Burrus*, 136 U. S. 586, 593–594 (1890), this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights. See *McCarty* v. *McCarty*, *supra*; *Hisquierdo* v. *Hisquierdo*, *supra*; *Free* v. *Bland*, 369 U. S. 663 (1962); *Wissner* v. *Wissner*, 338 U. S. 655 (1950); *McCune* v. *Essig*, 199 U. S. 382 (1905). Cf. *Yiatchos* v. *Yiatchos*, 376 U. S. 306, 309 (1964). While "[s]tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden," *Hisquierdo*, 439 U. S., at 581, with references to *United States* v. *Yazell*, 382 U. S. 341, 352 (1966), "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the

Framers of our Constitution provided that the federal law must prevail." *Free* v. *Bland*, 369 U. S., at 666. See also *Gibbons* v. *Ogden*, 9 Wheat. 1, 210–211 (1824). And, specifically, a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments. *McCarty* v. *McCarty*, *supra*; *Hisquierdo* v. *Hisquierdo*, *supra*. That principle is but the necessary consequence of the Supremacy Clause of our National Constitution.

In *Wissner* v. *Wissner*, *supra*, an insured under an NSLIA policy named his parents as beneficiaries. Upon his death, the serviceman's widow claimed community property rights in the policy proceeds. The NSLIA specifically provided that the insured had the right to designate and to change the beneficiary. It also had an anti-attachment clause. Despite these provisions, a California court held that the policy proceeds were community property, and it ordered half the proceeds paid to the widow. This Court reversed, noting that "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." 338 U. S., at 658. Further, "the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand." *Id.*, at 659. And the diversion, as directed by the state court, of future payments to be received by the beneficiary would be a "seizure" prohibited by the anti-attachment provision. *Ibid.* These are strong words and a positive ruling.

The same approach has been followed in later cases: *Free* v. *Bland*, *supra*, concerning the right of survivorship in United States Savings Bonds issued in co-ownership form; *Hisquierdo* v. *Hisquierdo*, *supra*, involving the Railroad Retirement Act of 1974, 45 U. S. C. § 231 *et seq.*; and *McCarty* v. *McCarty*, *supra*, concerning military retired pay.

The present case, we feel, is controlled by *Wissner*. Under §§ 717(a) and 770(a) of the SGLIA, just as under § 602(g) of the predecessor NSLIA, 54 Stat. 1010, at issue in

Wissner, the insured service member possesses the right freely to designate the beneficiary and to alter that choice at any time by communicating the decision in writing to the proper office. 338 U. S., at 658. Here, as there, it appropriately may be said: "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other."

There can be no doubt that Congress was aware of the breadth of the freedom of choice accorded the service member under the SGLIA. The pertinent House Report stated flatly: "The serviceman may designate any person as a beneficiary," H. R. Rep. No. 1003, 89th Cong., 1st Sess., 7 (1965), and the point was emphasized on the floor of the House by Representative Everett: "This bill permits you to leave your insurance to your church, to your college, to your best friend. The beneficiary provision is wide open under this option." 111 Cong. Rec. 24341 (1965). Thus, the Maine court's analysis is inconsistent both with the language of the Act and with its legislative history.[6]

Neither respondents nor the Supreme Judicial Court of Maine has questioned the authority of Congress to control payment of the proceeds of SGLIA policies. Indeed, this Court observed in *Wissner:*

> "Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exemption provision is his

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[6] In its consideration of the purpose of the SGLIA, the Supreme Judicial Court of Maine, *Ridgway* v. *Prudential Ins. Co. of America*, 419 A. 2d 1030, 1032–1033 (1980), relied upon a statement made in 1965 by the then Administrator of Veterans' Affairs. The statement is appended to H. R. Rep. No. 1003, 89th Cong., 1st Sess., 15–17 (1965). In our view, however, the remarks cannot be used to read the choice-of-beneficiary provision out of the Act. In context, it is plain that the statement was not intended to serve as an exhaustive list of congressional purposes; it merely identified some of the problems in the existing law that were addressed by the pending legislation.

> guarantee of the complete and full performance of the contract to the exclusion of conflicting claims. The end is a legitimate one within the congressional powers over national defense, and the means are adapted to the chosen end." 338 U. S., at 660–661.

The federal interest is especially strong because a substantial share of the proceeds of an SGLIA policy may be attributable to general tax revenues.

There are, to be sure, some small differences between the SGLIA and the predecessor NSLIA. In the provision granting the service member the right to designate the beneficiary, the words "at all times" appear in the earlier Act, 38 U. S. C. § 717(a), but not in the later one, 38 U. S. C. § 770(a), and the right to change the beneficiary "without the consent" of the one presently named is spelled out in § 717(a) but not in § 770(a). But the later Act's unqualified directive to pay the proceeds to the properly designated beneficiary clearly suggests that no different result was intended by Congress. And any possible ambiguity was eliminated by the Administrator's regulations that provide that a "change of beneficiary may be made at any time and without the knowledge or consent of the previous beneficiary." 38 CFR § 9.16(e) (1980). There has been no suggestion that these regulations are unreasonable, unauthorized, or inconsistent with the SGLIA, and such a suggestion would not be supportable.[7] See *Whirlpool Corp.* v. *Marshall*, 445 U. S. 1, 11–13 (1980); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965).

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[7] JUSTICE STEVENS suggests that the "interest in permitting a serviceman to designate the beneficiary of his insurance policy [expressed in § 770(a)] is not compromised" by the Maine court's decision. *Post*, at 80. While that may or may not be true as a matter of policy, the statute expressly commands that SGLIA proceeds go to the beneficiary or beneficiaries designated by the service member. And the implementing regulations expressly command that a "change of beneficiary . . . will take effect only if it is in writing, signed by the insured and received [by the appropri-

Yiatchos v. *Yiatchos*, 376 U. S. 306 (1964), relied on by the respondents, but not cited by the Maine court, does not stand to the contrary. In *Yiatchos*, the Court considered a question left open in *Free* v. *Bland*, 369 U. S., at 670–671, namely, the "scope and application" of the doctrine of fraud as an exception "to the regulatory imperative." 376 U. S., at 307. There, the decedent Yiatchos, a resident of a community property State, purchased United States Savings Bonds with community funds and had them issued in the name of the decedent but payable on his death to his brother. The state court held that this purchase "was in fraud of the rights" of the surviving wife, as "a void endeavor to divest the wife of any interest in her own property." *In re Yiatchos' Estate*, 60 Wash. 2d 179, 181–182, 373 P. 2d 125, 127 (1962). This Court agreed that the bonds could "not be used as a device to deprive the widow of property rights which she enjoys under Washington law." 376 U. S., at 309. But because the named beneficiary was entitled to the bonds "unless his deceased brother committed fraud or breach of trust tantamount to fraud" by wrongfully disposing of the wife's property, *ibid.*, the case was remanded to give the widow an opportunity to demonstrate that she had not consented to or ratified the purchase and registration of the bonds. The remand was also for the determination, under state law, whether the widow had an interest in the community's specific assets, or only a half interest in the estate generally.

Here, in contrast, Sergeant Ridgway's conduct did not amount to breach of trust or conversion of another's prop-

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ate office] prior to the death of the insured," 38 CFR § 9.16(d) (1980); "[n]o change or cancellation of beneficiary . . . in a last will or testament, or in any other document shall have any force or effect unless such change is received by the appropriate office." § 9.16(f). Yet JUSTICE STEVENS points to nothing in the language or history of the statute and regulations which suggests that Congress and the Administrator did not mean what they said.

erty. A careful reading of the complaint and the amended complaint, App. 11 and 24, in this case reveals no allegation of fraud or breach of trust. And we are not inclined to provide or infer such an allegation when a case comes to us, as this one does, with the record indicating nothing more than a breach of contract on the part of the deceased service member. Indeed, to say that this type of conduct constitutes constructive fraud would be to open the policy proceeds to a suit by any commercial creditor, a result that would render § 770(g) nugatory. As the trial court intimated, respondents may have a claim against the insured's estate for that breach; the record does not disclose whether a claim of that kind would be collectible.[8]

There is, finally, a fundamental distinction between respondents' asserted interests in the SGLIA policy proceeds and the community property concepts at issue in *Yiatchos*. Federal law and federal regulations bestow upon the service member an absolute right to designate the policy beneficiary.

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[8] JUSTICE POWELL looks to *Yiatchos* v. *Yiatchos*, 376 U. S. 306 (1964), and *Free* v. *Bland*, 369 U. S. 663 (1962), in concluding that "the principle of not allowing federal pre-emption to shield fraud or breach of trust" is applicable here. *Post*, at 64, n. 1. Those cases, however, were concerned with a particular type of fraudulent behavior: attempts "to divest the wife of any interest in *her own* property," *In re Yiatchos' Estate*, 60 Wash. 2d 179, 181–182, 373 P. 2d 125, 127 (1962) (emphasis added); see *Yiatchos*, 376 U. S., at 309, which grew out of "fraud or a breach of trust tantamount thereto on the part of a husband while acting in his capacity as manager of the general community property." *Free* v. *Bland*, 369 U. S., at 670. In this case, by way of contrast, Sergeant Ridgway misdirected property over which he had exclusive control. In doing so, of course, he deprived the respondents of benefits to which they were entitled under state law. But that is precisely what transpired in *Wissner* v. *Wissner*, 338 U. S. 655 (1950). Indeed, *Free* endorsed the *Wissner* holding, noting that "[t]here the Congress made clear its intent to allow a serviceman to select the beneficiary of his own government life insurance policy regardless of state law, even when it was likely that the husband intended to deprive his wife of a right to share in his life insurance proceeds, a right guaranteed by state law." 369 U. S., at 670. We are unable to distinguish the cases.

That right is personal to the member alone. It is not a shared asset subject to the interests of another, as is community property. Yiatchos had imposed his will upon property in which his wife had a distinct vested community interest. In contrast, only Sergeant Ridgway had the power to create and change a beneficiary interest in his SGLIA insurance. By exercising that power, he hardly can be said to have committed fraud.

We conclude, therefore, that the controlling provisions of the SGLIA prevail over and displace inconsistent state law.[9]

IV

The imposition of a constructive trust upon the insurance proceeds is also inconsistent with the anti-attachment provision, 38 U. S. C. § 770(g), of the SGLIA. In *Wissner*, 338 U. S., at 659, this Court invoked the identical anti-attachment provision of the NSLIA as an independent ground for the result reached in that case. The Court rejected, as it did so, *id.*, at 663–664, the dissent's argument that "Congress was interested in protecting [the fund], not the beneficiary," which parallels respondents' argument here in favor of creating a constructive trust after the proceeds have been received by the beneficiary. Any diversion of the proceeds of Sergeant Ridgway's SGLIA policy by means of a court-imposed constructive trust would therefore operate as a forbidden "seizure" of those proceeds.

The Maine court attempted to limit the reach of § 770(g), as has been noted above, on the theory that the purpose of the anti-attachment provision was to protect the policy proceeds from the claims of creditors, and that the provision has no

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[9] We need not presently address the legal aspects of extreme fact situations or of instances where the beneficiary has obtained the proceeds through fraudulent or illegal means as, for example, where the named beneficiary murders the insured service member. See *Shoemaker* v. *Shoemaker*, 263 F. 2d 931 (CA6 1959). Our ruling on a situation of that kind is reserved for another day.

application to minor children asserting equitable interests. 419 A. 2d, at 1033. This contention, however, fails to give effect to the unqualified sweep of the federal statute. Section 770(g), in addition to exempting the policy proceeds "from the claims of creditors," prohibits, in the broadest of terms, any "attachment, levy, or seizure by or under any legal or equitable process whatever," whether accomplished "either before or after receipt by the beneficiary." The reading adopted by the Maine court renders the bulk of the quoted statutory text extraneous. What was said of the statute under consideration in *Hisquierdo*, *supra*, is applicable without qualification here:

> "Like anti-attachment provisions generally [citing *Wissner*], it ensures that the benefits actually reach the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process '[n]otwithstanding any other law . . . of any State'. . . . It prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy." 439 U. S., at 584.[10]

We find nothing to indicate that Congress intended to exempt claims based on property settlement agreements from the strong language of the anti-attachment provision.[11]

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[10] *Burgess* v. *Murray*, 194 F. 2d 131 (CA5 1952), and *Voelkel* v. *Tohulka*, 236 Ind. 588, 141 N. E. 2d 344, cert. denied, 355 U. S. 891 (1957), relied on by the respondents but not cited by the Maine court, are not helpful. To be sure, in each of those NSLIA cases, a constructive trust was imposed on the policy proceeds. This, however, was done to further the service member's dispositive intent. Here Sergeant Ridgway apparently intended to favor Donna as his surviving spouse. In any event, the regulations implementing the SGLIA's beneficiary designation requirements are stricter than the corresponding regulations promulgated under the NSLIA. Compare 38 CFR §§ 8.46 and 8.47 (1980) (NSLIA) with 38 CFR §§ 9.16(d) and 9.16(f) (1980) (SGLIA).

[11] JUSTICE POWELL suggests, without supporting citation, that the anti-attachment provision is inapplicable in this case because of "the special na-

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We recognize that this unpalatable case suggests certain "equities" in favor of the respondent minor children and their mother. Sergeant Ridgway did have specific obligations to

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ture of the parental legal duty," noting that "[f]amilial obligations are not merely commercial." *Post*, at 70, 68. Again, *Wissner* answers this objection. There, the claimant was the decedent's widow, not a commercial creditor. Her action was grounded in the law of community property; the Court explicitly conceded that "[t]here are . . . support aspects to the community property principle, and in some cases they may be of considerable importance." 338 U. S., at 660, n. 4. The Court nevertheless struck down a state-court judgment in the widow's favor as being "in flat conflict" with the NSLIA's anti-attachment provision. *Id.*, at 659. We see no significant difference between the community property interest at issue in *Wissner* and the property settlement giving rise to the instant action.

JUSTICE STEVENS, meanwhile, argues that "it is most unlikely that Congress intended § 770(g) to operate as a bar to claims advanced by an insured's dependents for support," *post*, at 74; he reasons that "[p]rior to the decision of this Court in *Wissner*, a number of courts had held that statutory 'spendthrift' provisions did not bar a claim for alimony or support," *ibid.*, and "there is nothing . . . that evidences an intent by Congress to repudiate this distinction between commercial and family obligations." *Post*, at 78. And he suggests that "[t]he federal interest incorporated within exemption statutes is an interest in preventing federally supported benefits from satisfying claims of commercial creditors." *Post*, at 78–79.

While these are attractive arguments, neither of them survives close scrutiny. The more recent decisions, many involving facts almost identical to those before us, are virtually unanimous in concluding that the NSLIA anti-attachment provision *overrides* the contrary dictates of state family law. *E. g.*, *Hoffman* v. *United States*, 391 F. 2d 195 (CA9 1968) (anti-attachment provision overrides property settlement incorporated in divorce decree); *Kimball* v. *United States*, 304 F. 2d 864 (CA6 1962) (same); *Eldin* v. *United States*, 157 F. Supp. 34 (SD Ill. 1957) (same); *Williams* v. *Williams*, 255 N. C. 315, 121 S. E. 2d 536 (1961) (same); *Fleming* v. *Smith*, 69 Wash. 2d 277, 284, 418 P. 2d 147, 151 (1966) (same). Cf. *United States* v. *Donall*, 466 F. 2d 1246 (CA6 1972); *Taylor* v. *United States*, 459 F. 2d 1007 (CA9), cert. denied, 409 U. S. 967 (1972); *Suydam* v. *United States*, 131 U. S. App. D. C. 352, 404 F. 2d 1329 (1968); *Fitzstephens* v. *United States*, 189 F. Supp. 919 (Wyo. 1960); *Heifner* v.

the children that were imposed by the 1977 divorce judgment of the Maine court. Those obligations not only concerned life insurance "now outstanding" for the benefit of the children, but also extended to their support, to clothing, to "medical, dental, and optical expense," and to certain loans and other indebtedness. App. 13–15. Ridgway, instead, chose to name his then new wife as beneficiary of his SGLIA policy.[12]

A result of this kind, of course, may be avoided if Congress chooses to avoid it. It is within Congress' power. Thus far, however, Congress has insulated the proceeds of SGLIA insurance from attack or seizure by any claimant other than the beneficiary designated by the insured or the one first in line under the statutory order of precedence. That is Congress' choice. It remains effective until legislation providing otherwise is enacted.

The judgment of the Supreme Judicial Court of Maine is

Reversed.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

Soderstrom, 134 F. Supp. 174 (ND Iowa 1955). And it was against the background of these decisions that, in 1970, Congress enacted the SGLIA's anti-attachment provision—using language identical to that found in the NSLIA. Presumably, then, Congress did not intend to write into the statute the distinction made by JUSTICE STEVENS. And our view, we believe, most closely accords with the purpose of anti-attachment provisions like the one before us: they "ensur[e] that the benefits actually reach the beneficiary." *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 584 (1979).

[12] Respondents, in their brief and in oral argument, speak of the "unjust enrichment" of Donna Ridgway. The suggestion is not persuasive. The record discloses no wrong on Donna's part. She was, after all, the insured's lawful wife at the time of his death, and it is possible that depriving her of the proceeds would be as inequitable as any other result. We intimate no view as to whether wrongdoing by the named beneficiary would change the outcome. See n. 9, *supra*.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, dissenting.

The Court holds that the Servicemen's Group Life Insurance Act of 1965 (SGLIA or Act) broadly pre-empts state law. The Court also finds, as it must in light of previous decisions, that the pre-emptive power of this Act does not extend to cases of fraud or breach of trust. *Ante*, at 58, citing *Yiatchos* v. *Yiatchos*, 376 U. S. 306, 309 (1964).[1] See also *Free* v. *Bland*, 369 U. S. 663, 670 (1962) (pre-emption may not be used to create a "sanctuary for a wrongdoer's gains"); *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 582 (1979) (the "survivorship rules in federal savings bond and military life insurance programs override community property law, *absent fraud or breach of trust by the decedent*") (emphasis added).

The Court concludes, however, that there is not even an "allegation of fraud or breach of trust" in this case:

> "Sergeant Ridgway's conduct did not amount to breach of trust or conversion of another's property. A careful reading of the complaint and the amended complaint, App. 11 and 24, in this case reveals no allegation of fraud

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[1] The Court discerns a "fundamental distinction," *ante*, at 59, between this case and the application of the fraud exception to the savings bond program in *Yiatchos*. If there is a distinction, the principle of not allowing federal pre-emption to shield fraud or breach of trust is equally applicable. *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 582 (1979). As do the SGLIA provisions in this case, the savings bond regulations in *Yiatchos* bestowed upon the bond purchaser—irrespective of the source of his purchasing funds—an apparently absolute and pre-emptive federal right to designate who would benefit from the federal program upon his death. See *Free* v. *Bland*, 369 U. S. 663, 669 (1962). And as in this case, the party suffering from the exercise of this pre-emptive right claimed, as a matter of state law, to have a "shared" right to the asset in question. Indeed, in this case that state-law claim is stronger than in *Yiatchos*, since April and her children assert (under the state property settlement and divorce decree) an exclusive right to the entire SGLIA policy—not a "shared" right conferred by state community property law.

or breach of trust. And we are not inclined to provide or infer such an allegation when a case comes to us, as this one does, with the record indicating nothing more than a breach of contract on the part of the deceased service member." *Ante*, at 58–59.

I

In reaching the conclusion that this case presents "nothing more than a breach of contract," the Court's opinion does not linger over the facts.[2] The decree divorcing Richard from

[2] April's cross-claim against Donna alleges:

"4. The terms of the divorce decree had been agreed upon in advance by plaintiff April D. Ridgway and Richard H. Ridgway for the benefit of themselves and their three minor children following months of negotiations regarding questions of support for the children, clothing allowances, assumption of responsibility for payment of existing bills, maintenance of existing life insurance and payment thereof, and attorney's fees.

"5. The terms of the decree concerning the property settlement and continuing financial obligations of Richard H. and April D. Ridgway represented compromises from the original positions taken by the respective parties and were agreed to upon the understanding that the terms of the parties' agreement setting forth their mutual duties and obligations would be incorporated into the final divorce decree for their mutual benefit and the benefit of their three minor children.

"6. Paragraph 5 of the final divorce judgment required Richard H. Ridgway to keep in force his existing life insurance and make it payable to his three children.

"7. On or before April 3, 1978, in violation of the terms of the aforesaid agreement between the parties to the divorce judgment and of the divorce judgment itself, Richard H. Ridgway purported to change the beneficiary designation on his life insurance policy by writing the words 'at law' on a form provided for designating beneficiaries of servicemen's life insurance.

. . . . . .

"9. As a result of the facts recited above, Donna Ridgway stands in the position of a constructive trustee of said insurance proceeds for the benefit of the three minor children of Richard H. and April D. Ridgway." App. 25–26.

Donna admitted Paragraph 6, denied Paragraph 9, and claimed to be without sufficient information to form a belief as to the truth of Paragraphs 4, 5, and 7. She therefore denied these paragraphs. *Id.*, at 34.

[Footnote 2 is continued on p. 66]

his first wife April and incorporating the agreement of the parties was entered on December 7, 1977. The agreement required several months to negotiate, and it was negotiated in detail. April received custody of the couple's three children. Richard was entitled to claim one child as a tax exemption in 1977 and two in 1978. He was to make specified monthly support payments beginning in 1978 and increasing in 1979. Although Richard was to pay for his children's medical and dental expenses, April agreed to incur them, to the extent possible, "so that they will be payable under [Richard's] serviceman's insurance." App. 14. In addition to other particular exchanges and responsibilities, the settlement specified and the decree ordered:

> "Defendant [Richard] is ordered to keep in force the life insurance policies on his life now outstanding *for the benefit of the parties' three children.* If any of such insurance policies should subsequently be terminated for any reason, defendant shall immediately replace it with other life insurance of equal amount *for the benefit of the children.*" *Ibid.* (emphasis added).[3]

Less than four months later, Richard remarried and promptly changed the beneficiary clause of his serviceman's

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The parties did stipulate to these facts:

"Prior to their divorce, April Ridgway and Richard Ridgway carried on directly and through their attorneys, over a period of many months, negotiations regarding a property settlement including the disposition of Richard's existing life insurance. It was the intention of the parties that any agreement reached as a result of their negotiations would be incorporated into the divorce decree. In the course of the negotiations, a number of compromises were worked out between the parties regarding a division of the marital property and Richard's continuing obligation to support his children. The divorce decree dated December 7, 1977 did in fact incorporate the property settlement ultimately agreed to by the parties." *Id.*, at 33.

[3] It is clear from the emphasized language that the couple and the court were recognizing Richard's support obligation.

policy so that the entire insurance proceeds would go to his new wife, Donna.

I return to the Court's view that the complaint makes "no allegation of fraud or breach of trust," and that this is a simple case involving "nothing more than a breach of contract" by Richard. *Ante*, at 59. Perhaps the complaint, as amended, is inartful. Yet it specifically averred that a constructive trust existed under which Donna—the recipient of the insurance proceeds—was the "constructive trustee . . . for the benefit" of the children. App. 26. The Supreme Judicial Court of Maine explicitly held that a constructive trust existed and that Donna was the constructive trustee of the corpus of this trust.[4] In a technical sense, perhaps it can be argued there was "no allegation of fraud or breach of trust" as these precise terms were not used. But the complaint averred, *id.*, at 24, 25, and the substance of this case is, that a constructive trust was created by Richard's agreement and conduct.

In my view, the Court is plainly wrong in concluding that Richard's conduct was "nothing more than a breach of contract" and that his obligation was like that of "any commercial" debtor who defaults on a judgment.[5] *Ante*, at 59.

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[4] The Maine court stated:

"Courts have commonly imposed a constructive trust on the proceeds of life insurance policies in the hands of a named beneficiary when the deceased has failed, contrary to the provisions of a property settlement agreement or a divorce decree, to name his divorced wife or his children by his divorced wife as the beneficiaries of the life insurance policies. . . .

. . . . . .

"We cannot see how imposing a constructive trust to enforce a valid judicial decree implementing the serviceman's voluntary agreement to name his minor children as the beneficiaries of his SGLI policy can in any way frustrate or impede the accomplishment of any legitimate federal objective. Nor do we find anything in the literal language of [SGLIA] or in its legislative history which would prohibit such action." *Ridgway* v. *Prudential Ins. Co. of America*, 419 A. 2d 1030, 1031, 1034–1035 (1980).

[5] The provisions of § 770(g) of the Act, so emphasized in the Court's

Familial obligations are not merely commercial. Few legal duties are more universally acknowledged than the duty of a father to support his children. This duty existed in this case by law before the divorce. As a result of the divorce, it was recognized explicitly by Richard's contract with his family and by the divorce decree ordering him to discharge that duty by maintaining the insurance at issue for the benefit of his children. Yet, the Court today analogizes a father's support duty to that of a commercial debtor! This holding ignores the difference not only in character of the duties but also in their consequences. A defaulting debtor may be subjected to a judgment and an attachment lien. He may not be sent to jail. But a father who defaults on his duty to support his children or who violates a court decree enforcing that duty may be imprisoned for contempt.

The Court responds to this dissent in its footnotes 8 and 11. *Yiatchos* and *Free* are said to involve "a particular type of fraudulent behavior: attempts 'to divest the wife of any interest in her own property.'" *Ante*, at 59, n. 8 (emphasis deleted). The Court distinguishes, for the purpose of determining the pre-emption issue, between fraud or breach of trust that affects a wife's interest in community property and fraud or breach of trust that affects minor children's interest in a fund set aside for their support. I see no basis for such a distinction. *Yiatchos* and *Free* recognize, without qualifica-

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opinion, are explicitly designed to protect servicemen from the "claims of creditors." They certainly were not designed to allow a serviceman to misappropriate (in effect) a fund from insurance proceeds lawfully set aside for his children. As the Supreme Judicial Court of Maine correctly observed:

"[T]he statutory spendthrift provision found in Section 770(g) has no application to the instant case since its purpose is to protect the proceeds of the insurance from the claims of creditors. We are concerned here not with the claim of a creditor but with the claims of minor children who assert an equitable interest in the proceeds arising from their deceased father's voluntary agreement and a valid judicial decree." 419 A. 2d, at 1033.

tion, that "federal pre-emption [may not be allowed] to shield fraud or breach of trust." I would not have thought before today's decision that any court would suggest—much less find—that minor children are less entitled to be "shielded" from this type of conduct than an adult wife. Indeed, because of the difference between the capacity of an adult and that of young children, our law always has reflected a special solicitude for minors. See, *e. g.*, *Bellotti* v. *Baird*, 443 U. S. 622, 633–635 (1979).

The Court further argues that "by way of contrast" with a husband's "divest[ing]" his wife of her interest in community property, "Sergeant Ridgway [merely] *misdirected* property over which he had exclusive control." (Emphasis added.) *Ante*, at 59, n. 8. This is indeed a generous way to describe the Sergeant's conduct. Moreover, the statement that he had "exclusive control" over the property begs the very question before us: whether Richard retained this control despite his conduct. He had divested himself voluntarily of all interest in the insurance policies by the agreement. The Maine court had approved the agreement, and ordered Richard to comply with it. He had far less "control" over the fund he had thereby created for his children's support than the husband had in either *Yiatchos* or *Free*. He had no interest whatever in the policies to "misdirect" to his new wife unless—contrary to those decisions—the Act is now read to allow fraud or breach of trust.[6]

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[6] The Court finds *Wissner* v. *Wissner*, 338 U. S. 655 (1950), to be controlling. In my view, its authority—though marginal—is supportive of the claim of the children in this case. *Wissner* involved a community property question arising when the serviceman assigned his insurance to his mother, thereby divesting his wife's property interest. The serviceman had made no independent commitment to his wife comparable to that by the father to his children in this case. Second, *Wissner* justified applying the federal anti-assignment provision to community property by referring to "the *business* relationship of man and wife for their *mutual monetary profit*." *Id.*, at 660 (emphasis added). This reasoning does not describe the

I would hold that the special nature of the parental legal duty, as expressly manifested in this case by both Richard's negotiated bargain with his family and by the terms of his divorce decree, imposes a constructive trust upon the proceeds of the insurance for the benefit of Richard's children as a matter of federal law.[7] As the Court acknowledges, *ante*, at 58, the intention of Congress to supplant state law does not extend to a breach of trust. Here the fund impressed with a trust should be held for its agreed purpose in accordance with the law of Maine.[8] I would affirm the judgment of the Supreme Judicial Court of Maine.

II

Although I think the breach-of-trust issue is dispositive, I would be willing—in the interest of preventing what seems to me a uniquely unjust decision—to join an opinion remanding the case to the Maine Supreme Judicial Court on the issue of fraud.[9] There is no specific allegation of fraud, and yet the admitted facts create the strongest inference that Richard intended to evade his support obligation by diverting to his

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parental duty. *Wissner* recognized this. It emphasized that "specific judicial recognition" of the "moral obligation" to "suppor[t] spouse and children" would have presented a different case. *Ibid.* Finally, both *Yiatchos* and *Free* were decided subsequently to *Wissner* and each of these explicitly left room for an exception from pre-emption where fraud or breach of trust existed.

[7] See *Yiatchos* v. *Yiatchos*, 376 U. S. 306, 309 (1964); *Free* v. *Bland*, 369 U. S., at 670–671, and n. 14.

[8] See, *e. g.*, *Board of County Comm'rs* v. *United States*, 308 U. S. 343, 349–350, 351–352 (1939).

[9] "[W]hether or not there is fraud which will bar the named beneficiary in a particular case must be determined as a matter of federal law . . . ." *Yiatchos* v. *Yiatchos*, *supra*, at 309. Cf. Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 816–820 (1957) (national rather than state definition of "competency" appropriate for the SGLIA's predecessor).

new wife the fund he had created for the benefit of his children. The temporal sequence itself is persuasive. Following several months of negotiation, the divorce was granted on December 7, 1977, but only on conditions that included the funding of the support obligation. On March 28, 1978, less than four months thereafter, Richard married Donna. Six days later he stripped his children of this fund by changing the beneficiary clause so that Donna would receive the proceeds. This hardly was an inadvertent act. It is unlikely that even the enchantment of a new wife caused him to forget both his duty and his obligation to his children.

It would be appropriate, however, to afford the state courts an opportunity to address the fraud issue. The Supreme Judicial Court of Maine ruled in April's favor without considering this alternative theory. This Court should not foreclose this consideration, for whether April will be permitted to advance this argument at this stage of the proceedings is a question of *state* procedural law.

JUSTICE STEVENS, dissenting.

As a matter of state law, the Maine Supreme Judicial Court imposed a constructive trust on the proceeds of Sergeant Ridgway's life insurance. The trust effectuates a settlement agreement and an express judicial decree that commanded Ridgway to maintain the policy in effect for the benefit of his minor children.[1] The propriety of the imposi-

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[1] The imposition of a constructive trust on these facts is common in the law, and has been recognized in cases in which no wrongdoing could be imputed to the designated beneficiary. *Simonds* v. *Simonds*, 45 N. Y. 2d 233, 380 N. E. 2d 189 (1978); *McKissick* v. *McKissick*, 93 Nev. 139, 560 P. 2d 1366 (1977); *Richards* v. *Richards*, 58 Wis. 2d 290, 206 N. W. 2d 134 (1973); see also G. Bogert, Trusts and Trustees § 475 (rev. 2d ed. 1978). As stated in *Simonds* v. *Simonds*, *supra*, at 242, 380 N. E. 2d, at 194 (citations omitted):

"Unjust enrichment, however, does not require the performance of any wrongful act by the one enriched. Innocent parties may frequently be un-

tion of a constructive trust under Maine law is, of course, not a matter for us to review.[2] Unless the application of this well-established equitable doctrine does "major damage" to "clear and substantial federal interests,"[3] we must respect it.

Notwithstanding the absence of any such major damage, the Court today decides that the Maine court's decision conflicts with two provisions of the Servicemen's Group Life Insurance Act (SGLIA), 38 U. S. C. §§ 765–776.[4] The Court finds a conflict with § 770(a) of the statute, which gives the serviceman the right to designate his beneficiary, and with § 770(g), which exempts the insurance proceeds from taxation and from seizure by legal or equitable process. Because the Court in *Wissner* v. *Wissner*, 338 U. S. 655, relied on similar provisions of the National Service Life Insurance Act of 1940, 54 Stat. 1008, in rejecting a claim to insurance proceeds paid under that statute, the Court today concludes that *Wissner* is controlling and that it must reach a similar result.

Unquestionably, there is a strong federal interest in protecting federally supported benefits from claims of the recipient's commercial creditors.[5] There is also a federal interest, much less clearly defined, in permitting a federal serviceman

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justly enriched. What is required, generally, is that a party hold property 'under such circumstances that in equity and good conscience he ought not to retain it.' A bona fide purchaser of property upon which a constructive trust would otherwise be imposed takes free of the constructive trust, but a gratuitous donee, however innocent, does not."

[2] "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U. S. 586, 593–594.

[3] "State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden. *United States* v. *Yazell*, 382 U. S. 341, 352 (1966)." *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 581.

[4] The SGLIA was enacted in 1965. 79 Stat. 880. Relevant amendments were made in 1970. 84 Stat. 326.

[5] Federal benefit programs often provide that benefits are exempt from legal process. See, *e. g.*, 5 U. S. C. § 8346(a) (Civil Service Retirement

to designate the beneficiary of his insurance policy. Both of these federal interests supported the rejection of the estranged wife's claim in *Wissner*. A careful examination of this case, however, demonstrates that neither of these interests is compromised by the decision of the Maine Supreme Judicial Court.

I

Since the alleged conflict with the exemption provision is more obvious in this case, and concerns a more substantial federal interest, I address it first. The statute provides:

> "Payments of benefits due or to become due under Servicemen's Group Life Insurance or Veterans' Group Life Insurance made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U. S. C. § 770(g).

This provision prohibits a commercial creditor from securing insurance proceeds in the hands of the beneficiary, regardless

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benefits); 28 U. S. C. § 376(n) (annuities for survivors of judicial officials); 42 U. S. C. § 3796(f) (1976 ed., Supp. III) (Public Safety Officers' Death benefits); 45 U. S. C. § 231m (Railroad Retirement benefits). It is interesting to note, however, that 42 U. S. C. § 659(a) (1976 ed., Supp. III) provides that "[n]otwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to an individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments." This statute removes the sovereign immunity of the Government in an action brought to enforce a support obligation, and would appear to express a clear federal interest in the enforcement of such obligations.

of any contrary agreement made by the insured or any terms of state law. Although the majority concludes that this provision also prohibits the state court from recognizing respondents' claim in this case, *ante*, at 60, it is most unlikely that Congress intended § 770(g) to operate as a bar to claims advanced by an insured's dependents for support.

The language used in the "anti-attachment" provision of the SGLIA is comparable to that found in so-called "spendthrift clauses" that have protected trust beneficiaries from the claims of commercial creditors for centuries.[6] As stated by Dean Griswold, "[i]t is widely held, however, that even where such trusts are generally valid, the interest of the beneficiary may be reached for the support of his wife or children, or for the payment of alimony to his wife." E. Griswold, Spendthrift Trusts 389 (2d ed. 1947).[7] Prior to the decision of this Court in *Wissner*, a number of courts had held that statutory "spendthrift" provisions did not bar a claim for alimony or support.[8] Many of these cases in fact

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[6] See generally E. Griswold, Spendthrift Trusts (2d ed. 1947); Bogert, *supra* n. 1, §§ 221–230; 2 A. Scott, Law of Trusts §§ 149–162 (3d ed. 1967).

[7] The Restatement (Second) of Trusts § 157(a) (1957) also provides:

"Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary,

"(a) by the wife or child of the beneficiary for support, or by the wife for alimony . . . ."

See also Bogert, *supra* n. 1, § 224; 2 Scott, *supra* n. 6, § 157.1, and cases cited.

[8] See *Schlaefer* v. *Schlaefer*, 71 App. D. C. 350, 112 F. 2d 177 (1940); *In re Flanagan*, 31 F. Supp. 402 (DC 1940); *Hannah* v. *Hannah*, 191 Ga. 134, 11 S. E. 2d 779 (1941); *Gaskins* v. *Security-First National Bank*, 30 Cal. App. 2d 409, 86 P. 2d 681 (1939); *In re Gardner*, 220 Wis. 493, 264 N. W. 643 (1936); *Stirgus* v. *Stirgus*, 172 Miss. 337, 160 So. 285 (1935); *Stone* v. *Stone*, 188 Ark. 622, 67 S. W. 2d 189 (1934); *Hollis* v. *Bryan*, 166 Miss. 874, 143 So. 687 (1932). See also R. Kimbrough & J. Glen, American Law of Veterans 28–33 (2d ed. 1954); *Dillard* v. *Dillard*, 341 S. W. 2d 668 (Tex. Civ. App. 1960). But see *Conaway* v. *Conaway*, 218 Cal. App. 2d 427, 32

concerned exemption provisions applicable to veterans' benefits programs. As summarized in one treatise:

> "And claims for the support and care of minor children of an incompetent veteran have been held not to be subject to the exemption, as the obligation of a father to support his minor children is not a debt within the meaning of the statute, but is an obligation growing out of the parental status and public policy." R. Kimbrough & J. Glen, American Law of Veterans 32 (2d ed. 1954).[9]

A thoughtful and expansive opinion of Justice Rutledge, then a member of the United States Court of Appeals for the District of Columbia, best explains the rationale of these decisions. In *Schlaefer* v. *Schlaefer*, 71 App. D. C. 350, 112 F. 2d 177 (1940), the court considered a claim for arrears in alimony payments. Plaintiff sought sequestration of her former husband's property, including $100 per month that he received as disability benefit payments under the Life Insurance Act for the District of Columbia. Defendant responded that these payments were exempted specifically from process under the express language of § 16(a) of that federal statute.[10]

Cal. Rptr. 890 (1963); *Riker* v. *Riker*, 160 Misc. 117, 289 N. Y. S. 835 (1936); *Brewer* v. *Brewer*, 19 Tenn. App. 209, 84 S. W. 2d 1022 (1933).

[9] See also Rogers, Enforcement of Claim for Alimony or Support, or for Attorneys' Fees and Costs Incurred in Connection Therewith, Against Exemptions, 54 A. L. R. 2d 1422 (1957); Annot., Construction and Application of Provisions of Federal Statutes in Relation to Exemption from Claims of Creditors of Amounts Paid as Pensions, War Risk Insurance, Compensation, Bonus, or Other Relief for Veterans, 109 A. L. R. 433 (1937).

[10] The exemption statute provided:

"No money or other benefit paid, provided, allowed, or agreed to be paid by any company on account of the disability from injury or sickness of any insured person shall be liable to execution, attachment, garnishment, or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law, to pay any debt or liability of such insured person whether such debt or liability was incurred before or after the commencement of such disability, but the provisions of this section

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The court in *Schlaefer* stated that "[t]he basic issue boils down to whether Congress intended to relieve the disabled insured to the extent of his disability payments from legally enforceable obligation to support his family and those legally dependent upon him." *Id.*, at 358, 112 F. 2d, at 185. The court recognized:

> "So far as general creditors are concerned the purpose is clear, with the exceptions stated, to make the disposition of these funds a matter solely for his judgment. Congress regarded it as better for the creditors to go unpaid than to deprive the debtor and his dependents of this means of support when earning capacity would be cut off. Hence it used broad language prohibiting recourse to the fund by legal process." *Ibid.*

The court determined, however, that the insured's legal dependents were not to be classified, for purposes of the statute, "with strangers holding claims hostile to his interest." *Ibid.* The court noted that "the usual purpose of exemptions is to relieve the person exempted from the pressure of claims hostile to his dependents' essential needs as well as his own personal ones, not to relieve him of familial obligations and destroy what may be the family's last and only security, short of public relief." *Ibid.*

The court concluded that this construction was "not inconsistent with giving full effect to the statute." *Id.*, at 359, 112 F. 2d, at 186. As explained by the court:

> "The protection remaining is broad, applying both to 'debts' and to 'liabilities.' Furthermore, it renders the

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shall not affect the assignability of any such disability benefit otherwise assignable, nor shall this section apply to any money income disability benefit in an action to recover for necessaries contracted for after the commencement of the disability covered by the disability clause or contract allowing such money income benefit." Life Insurance Act for the District of Columbia, § 16(a), 48 Stat. 1175.

> statute consistent with others which provide methods for enforcement of the husband's and the father's duty of support. Any other would nullify them in circumstances where the disability payments constitute the sole source of livelihood, though they might be adequate to support the insured and all his dependents in luxury. We cannot believe that Congress intended to create an exemption so broad and so inconsistent with the policy which it has declared in other acts." *Ibid.* (footnote omitted).

The court further noted that its construction of the exemption statute was consistent with other authorities, which had held that a claim for support was not a "debt" or a "liability" in the ordinary usages of those terms.[11]

In *Wissner*, the Court did not repudiate this distinction between family and business obligations. Rather, in ruling that the exemption statute was applicable in that case, the Court expressly recognized this distinction and placed the estranged wife's community property claim in the business category. As stated by the Court, "we must note that the community property principle rests upon something more than the moral obligation of supporting spouse and children: the business relationship of man and wife for their mutual monetary profit." 338 U. S., at 660.[12] As a result, it simply can-

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[11] The force of Justice Rutledge's opinion has not diminished over time. In *Cody* v. *Riecker*, 454 F. Supp. 22 (EDNY 1978), aff'd, 594 F. 2d 314 (CA2 1979), the court relied extensively on Justice Rutledge's analysis in concluding that the exemption provision contained in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1001 *et seq.*, did not bar a divorced wife's attachment of pension benefits to satisfy arrears in an obligation to provide support.

[12] The care with which Justice Clark preserved the basic distinction presents a sharp contrast to the Court's blithe reliance on *Wissner* as controlling today. It is worth quoting in full the Court's treatment of the issue:

"We recognize that some courts have ruled that this and similar exemp-

not be said that *Wissner* commands that an exemption statute such as that present in this case stands as a bar to claims based on familial obligations.

Although *Wissner* left open the question presented in this case, there is nothing in the language of the SGLIA or its legislative history that evidences an intent by Congress to repudiate this distinction between commercial and family obligations.[13] The federal interest incorporated within exemption statutes is an interest in preventing federally supported benefits from satisfying claims of commercial credi-

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tions relating to pensions and veterans' relief do not apply when alimony or the support of wife or children is in issue. See *Schlaefer* v. *Schlaefer*, 71 App. D. C. 350, 112 F. 2d 177 (1940); *Tully* v. *Tully*, 159 Mass. 91, 34 N. E. 79 (1893); *Hodson* v. *New York City Employees' Retirement System*, 243 App. Div. 480, 278 N. Y. S. 16 (1935); *In re Guardianship of Bagnall*, 238 Iowa 905, 29 N. W. 2d 597 (1947), and cases therein cited. But cf. *Brewer* v. *Brewer*, 19 Tenn. App. 209, 239–241, 84 S. W. 2d 1022, 1040 (1933). We shall not attempt to epitomize a legal system at least as ancient as the customs of the Visigoths, but we must note that the community property principle rests upon something more than the moral obligation of supporting spouse and children: the business relationship of man and wife for their mutual monetary profit. See de Funiak, Community Property, § 11 (1943). Venerable and worthy as this community is, it is not, we think, as likely to justify an exception to the congressional language as specific judicial recognition of particular needs, in the alimony and support cases. Our view of those cases, whatever it may be, is irrelevant here.[4]

"[4] There are, of course, support aspects to the community property principle, and in some cases they may be of considerable importance. Likewise alimony may not be limited to the amount essential to support the divorced spouse. But we do not think the Congress would have intended decision to turn on factual variations in the spouse's need. If there is a distinction to be drawn, we think it must be based upon a generalization as to the dominating characteristics of a particular class of cases—alimony cases, support cases, community property cases. The alimony cases have uniformly been decided on that basis." 338 U. S., at 659–660, and n. 4.

[13] Sergeant Ridgway's second wife of course has no obligation to support Ridgway's children of a prior marriage. The state court judgment in this case affects only the disposition of Sergeant Ridgway's life insurance, however, "over which he had exclusive control." *Ante*, at 59, n. 8.

tors. Although such claims are certainly valid, they arise solely from a personal obligation of the debtor, and should not be borne by the public through payment from general revenues. Claims based on familial obligation, however, are of a different character, and indeed may be precisely the type of claim for which the federal benefit was intended.[14] Absent some indication that Congress intended the standard exemption provision contained in the SGLIA to bar a minor child's claim for support, I am unwilling to conclude that this provision of the statute pre-empts the application of state law in this case.

II

When the exemption provision is put to one side, the only support for the Court's pre-emption holding is the statutory provision giving the serviceman the right to designate the beneficiary of his insurance policy.[15] In order to determine whether the decision of the Maine court has done "major damage" to the federal interests underlying this statutory provision, it is first appropriate to identify those federal interests precisely.

The right to designate the beneficiary of an insurance policy is a common feature in insurance contracts. It surely is not a right that can be characterized as uniquely federal in any sense. Moreover, the mere fact that the right has its

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[14] It is noteworthy that this Court has decided that "[w]ar risk insurance was made available to those in active military service for the greater protection of themselves and their dependents." *United States* v. *Williams*, 302 U. S. 46, 50. See also n. 16, *infra*.

[15] The statutory provision relied on by the Court simply provides:

"(a) Any amount of insurance under this subchapter in force on any member or former member on the date of his death shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date of his death, in the following order of preference:

"First, to the beneficiary or beneficiaries as the member or former member may have designated by a writing . . . ." 38 U. S. C. § 770(a).

source in a federal statute does not require that it be given a construction different from that given a comparable right created by state law or by private contract. As stated by this Court in *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 583, "[t]he federal nature of the benefits does not by itself proscribe the entire field of state control."

To be sure, the Court in *Wissner* speculated that "[p]ossession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman." 338 U. S., at 660. This interest in permitting a serviceman to designate the beneficiary of his insurance policy is not compromised in this case, however. It cannot be said that state law forces a distribution of the insurance proceeds that is inconsistent with the federal policy of permitting Sergeant Ridgway to choose his beneficiary. In a freely negotiated child custody and support settlement, Ridgway agreed to maintain his former wife as the beneficiary of the policy for the benefit of his minor children. Ridgway himself made that choice; the question presented in this case, therefore, is whether any provision of the statute espouses a federal interest in permitting him to change his beneficiary in derogation of an accepted obligation to provide support for his children. I can find no section of the statute that expresses such an interest. The result reached by the Court today surely cannot be justified by the need to maintain the "morale" of our Armed Forces.

The history of the statutory provision defining the serviceman's right to designate his beneficiary supports the conclusion that § 770(a) does not pre-empt state law in this case. Originally, servicemen could name as beneficiaries only those persons who fell within a limited, defined class.[16] At the

[16] In the War Risk Insurance Act of 1917, § 402, 40 Stat. 409, insurance proceeds were payable only to a spouse, child, grandchild, parent, brother, or sister. In 1919 the Act was amended and the permitted class of beneficiaries was enlarged to include uncles, aunts, nephews, nieces, brothers-in-

time *Wissner* was decided, servicemen could designate only a spouse, child, grandchild, parent, or sibling as a beneficiary of a National Service Life Insurance policy. The designation provision at issue in *Wissner* thus added support for the proposition that insurance proceeds were intended to benefit only immediate family members and dependents of the serviceman, and not any other party.

When Congress enacted the SGLIA in 1965, however, it removed all limitations on eligible beneficiaries. 79 Stat. 883. Any person may be named as beneficiary of the policy, including a commercial creditor. Today, the Court gives priority to the claim of any such designated beneficiary. Thus, as a result of its decision, a loan shark, a camp follower, or a total stranger designated as beneficiary would have priority over claims of dependent family members, even though those claims were incorporated in a voluntary settlement agreement and an express judicial decree. This result simply was not possible at the time *Wissner* was decided. No federal interest justifies such an absolute and unqualified priority for the designated beneficiary.[17]

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law, and sisters-in-law. 41 Stat. 371, 375. This class of eligible beneficiaries was retained in the World War Veterans Act of 1924, 43 Stat. 607, 624. In the National Service Life Insurance Act of 1940, § 601(g), 54 Stat. 1010, Congress provided that "[t]he insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as a beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), brother or sister of the insured."

[17] It is of interest that, in an early case involving a dispute between a serviceman's mother, who had been designated as the sole beneficiary of an insurance policy under the War Risk Insurance Act of 1917, 40 Stat. 398, 409, and a serviceman's aunt, who had an equitable claim to one-half of the policy proceeds, this Court ordered an equitable distribution. *White* v. *United States*, 270 U. S. 175. A federal rule that the designated beneficiary should always prevail against equitable claims would have required a contrary result.

It is ironic that today's decision may harm federal interests in a more tangible way than that ascribed to the decision of the Maine Supreme Judicial Court. As a result of the holding today, a commitment to keep military insurance in effect for one's children is not legally binding. In the future, a serviceman in divorce negotiations may be forced to purchase new insurance from a private insurer in order to provide fair assurance that his support obligation will remain satisfied in the event of his death. For many servicemen, such private insurance may not be easy to obtain. Surely there is no federal interest in depreciating the value of this insurance.

I respectfully dissent.

LEEKE, DIRECTOR OF SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. *v.* TIMMERMAN ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80–2077. Decided November 16, 1981

Respondents, who were inmates in a South Carolina prison, contended that they were unnecessarily beaten by prison guards during a prison uprising. One respondent sought criminal arrest warrants against four guards, and a state-court Magistrate, acting on the basis of affidavits and information presented by the respondent, informed the legal adviser to the South Carolina Department of Corrections of his intent to issue the warrants. After a meeting with correctional officials, the State Solicitor, by a letter to the Magistrate, requested that the warrants not be issued and stated that he intended to seek an investigation of the charges against the prison guards. The Magistrate did not issue the warrants, and no state investigation was initiated. Respondents subsequently filed suit against petitioners (the legal adviser and the Director of the Department of Corrections) and other state officials in Federal District Court, contending that they had violated 42 U. S. C. § 1983 by conspiring in bad faith to block the issuance of arrest warrants for the prosecution of the guards. The District Court found petitioners liable for damages and attorney's fees, although the State Solicitor and the Magistrate were found to be immune from liability. The Court of Appeals affirmed.

Held: Petitioners' actions, by which they influenced the State Solicitor's decision to oppose issuance of the arrest warrants, did not violate any judicially cognizable rights of respondents. There is a questionable nexus between respondents' injury—the alleged beatings—and the state officials' actions in which they gave information to a Magistrate prior to issuance of an arrest warrant. Even if a prosecution could remedy respondents' injury, the issuance of an arrest warrant is simply a prelude to, and would not necessarily result in, actual prosecution. The decision to prosecute is solely within the prosecutor's discretion. Thus, a private citizen has no judicially cognizable right to prevent state officials from presenting information, through intervention of the state solicitor, that will assist a magistrate in determining whether to issue an arrest warrant. *Linda R. S.* v. *Richard D.*, 410 U. S. 614, controls here.

Certiorari granted; 639 F. 2d 783, reversed.

PER CURIAM.

Petitioners, state correctional officials, seek review of a decision of the United States Court of Appeals for the Fourth Circuit finding petitioners in violation of 42 U. S. C. § 1983 for opposing respondents' application for an arrest warrant. We grant the motion of respondents for leave to proceed *in forma pauperis* and the petition for writ of certiorari and reverse on the basis of our decision in *Linda R. S.* v. *Richard D.*, 410 U. S. 614 (1973).

I

Respondents were prison inmates in the Central Correctional Institution in Columbia, S. C., at the time of a prison uprising in August 1973. Respondents contend that during the uprising they were unnecessarily beaten by prison guards. Respondent Timmerman sought criminal arrest warrants against four prison guards. In support of his action, Timmerman presented sworn statements to a Magistrate along with alleged "confidential information" from an employee at the prison who purportedly investigated the incident and concluded that respondents were victimized by the prison guards. Although a subsequent hearing in the Federal District Court indicated that the information provided by Timmerman was "suspect at best," it provided sufficient evidence to convince the state-court Magistrate that probable cause existed for issuance of arrest warrants against the prison guards. The Magistrate informed the legal adviser to the South Carolina Department of Corrections of his intent to issue the warrants and the legal adviser relayed this information to the prison Warden.

In an effort to have the criminal action against the correctional officers dropped, the legal adviser and Warden met with the County Sheriff, Deputy Attorney, and State Solicitor. At the meeting, the State Solicitor reviewed the facts and stated that there would be no indictment against three of the accused guards, but that he was unsure whether an in-

dictment would be sought against the fourth guard. As a result of the meeting, the State Solicitor wrote a letter to the Magistrate requesting that the warrants not be issued. The Solicitor also stated that he intended to ask the State Law Enforcement Division to conduct an investigation concerning the charges made against the officers involved; the Magistrate did not issue the warrants and no state investigation was initiated.

Respondents subsequently filed suit in the United States District Court for the District of South Carolina contending, among other claims, that petitioners conspired in bad faith to block the issuance of the arrest warrants for the prosecution of the prison guards. The District Court concluded that petitioners denied respondents their right to "a meaningful ability to set in motion the governmental machinery because [petitioners' activities] stopped the machinery unlawfully, not in a proper way, as for example, upon a valid determination of lack of probable cause."[1] Although the State Solicitor and the Magistrate were found to be immune from damages, the District Court concluded that the legal adviser to the prisons and the Director of the Department of Corrections were liable for their actions in requesting the State Solicitor to discourage issuance of the warrants. Respondents were awarded $3,000 in compensatory damages, $1,000 in punitive damages and attorney's fees against the two petitioners.

The United States Court of Appeals for the Fourth Circuit affirmed and acknowledged that under *Linda R. S.* v. *Richard D.*, *supra*, at 619, "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of

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[1] The case had previously been appealed to the United States Court of Appeals for the Fourth Circuit, at which time the Court of Appeals determined that the State Magistrate and State Solicitor were not insulated from declaratory and injunctive relief by judicial immunity and that the action was not barred by *Younger* v. *Harris*, 401 U. S. 37 (1971). *Timmerman* v. *Brown*, 528 F. 2d 811 (1975).

another." The Court of Appeals concluded, however, that *Linda R. S.* did not foreclose respondents' right to seek an arrest warrant.

II

In *Linda R. S.* the mother of an illegitimate child brought an action in United States District Court to enjoin "discriminatory application" of a Texas Penal Code provision that imposed criminal sanctions on a parent who willfully deserted, neglected, or refused to provide child support. The Texas courts had held that the statute applied only to the parents of legitimate children and did not apply to the parents of illegitimate children. We held that the appellant in *Linda R. S.* did not have standing to challenge the statute because she had failed to allege a sufficient nexus between her injury and the government's failure to prosecute fathers of illegitimate children. Even if the appellant in *Linda R. S.* were granted the requested relief, the Court concluded that the remedy sought by the appellant would not guarantee payment of child support. The remedy sought would only increase the probability of prosecution of the father for the failure to provide support, and "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Ibid.*

Our holding in *Linda R. S.* controls disposition here. The threshold inquiry is whether respondents have standing to challenge the actions of petitioners. As in *Linda R. S.*, there is a questionable nexus between respondents' injury—the alleged beatings—and the actions of the state officials in which they gave information to a Magistrate prior to issuance of an arrest warrant. Even without the prosecutor's acts, there is no guarantee that issuance of the arrest warrant would remedy claimed past misconduct of guards or prevent future misconduct. Even if a prosecution could remedy respondents' injury, the *issuance* of an arrest warrant in this case is simply a prelude to actual prosecution. Respondents

concede that the decision to prosecute is solely within the discretion of the prosecutor. It is equally clear that issuance of the arrest warrant in this case would *not* necessarily lead to a subsequent prosecution.

A private citizen therefore has no judicially cognizable right to prevent state officials from presenting information, through intervention of the state solicitor, that will assist the magistrate in determining whether to issue the arrest warrant. Just as respondents were able to present arguments as to why an arrest warrant should issue, a state solicitor must be able to present arguments as to why an arrest warrant should not issue. This is not a case in which prison officials interfered with the transmittal of information from respondents to the magistrate, thereby interfering with respondents' ability under South Carolina law to seek the arrest of another. S. C. Code § 22–3–710 (1976).[2]

In this case respondents had access to judicial procedures to redress any claimed wrongs. Respondents, in other words, were able to "set in motion the governmental machinery," *Lane* v. *Correll*, 434 F. 2d 598, 600 (CA5 1970), and bring their complaints to the attention of the Magistrate. The actions of the state officials, by which they influenced the decision of the State Solicitor to oppose issuance of the arrest warrants, thus did not violate any judicially cognizable rights of respondents.[3]

The judgment of the Court of Appeals is

Reversed.

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[2] As early as 1870 the South Carolina Supreme Court indicated that under South Carolina law, "[s]ave for the just and proper vindication of the law, no one has an interest in the conviction of [another]." *State* v. *Addison*, 2 S. C. 356, 364.

[3] This conclusion comports with the smooth functioning of the criminal justice system. The American Bar Association Standards for Criminal Justice, The Prosecution Function 3–3.4 (2d ed. 1980), propose that where the law permits a private citizen to complain directly to a judicial officer, the complainant "should be required to present the complaint for prior approval to the prosecutor, and the prosecutor's actions or recommendation

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

In my view, the Court, by mischaracterizing respondents' alleged injury, improperly invokes *Linda R. S.* v. *Richard D.*, 410 U. S. 614 (1973), to deny respondents standing in this civil action brought pursuant to 42 U. S. C. § 1983 and 42 U. S. C. § 1985(3) (1976 ed., Supp. IV).

Linda R. S. involved a challenge to Texas' enforcement of Art. 602 of the Texas Penal Code, brought by the mother of an illegitimate child. Article 602 provided in part that "any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years." The State construed Art. 602 to apply only to parents of legitimate children, and had accordingly declined to prosecute the father of the appellant's child despite his refusal to provide support for the child. The appellant sought to enjoin the State's "discriminatory application" of the statute. Holding that the appellant lacked standing to raise this challenge to the construction of the State's criminal statute, this Court affirmed the dismissal of the action. The Court reasoned that while the "appellant no doubt suffered an injury stemming from the failure of her child's father to contribute support payments," there was no "'direct' relationship" between the State's failure to prosecute the father and the injury sustained. *Linda R. S.*, *supra*, at 618. Rather, the Court declared, "[t]he prospect that prosecution will, at least in the

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thereon should be communicated to the judicial officer or grand jury." Many jurisdictions contain provisions for private citizens to initiate the criminal process, and some have required or encouraged input of the prosecuting attorney before issuance of an arrest warrant. See, *e. g.*, Neb. Rev. Stat. § 29–404 (1979); Ohio Rev. Code Ann. § 2935.10 (1975); S. D. Comp. Laws Ann. § 23A–2–2 (1979); Wis. Stat. § 968.02(3) (1977).

future, result in payment of support can, at best, be termed only speculative." 410 U. S., at 618.

The Court seeks to bring the present case within the holding of *Linda R. S.* by suggesting that "[a]s in *Linda R. S.*, there is a questionable nexus between respondents' injury—the alleged beatings—and the actions of the state officials in which they gave information to a Magistrate prior to issuance of an arrest warrant. . . . It is . . . clear that issuance of the arrest warrant in this case would *not* necessarily lead to a subsequent prosecution." *Ante*, at 86–87. The Court's analysis simply cannot withstand scrutiny. Contrary to the Court's suggestion, the respondents' alleged injury—for the purposes of their civil action brought pursuant to §§ 1983 and 1985(3)—is not the "beatings," but rather the deprivation of their constitutional right of access to the courts, assured by the First and Fourteenth Amendments. They have alleged that petitioners' conspiratorial acts deprived them of their right to *seek* an arrest warrant, and thus denied them their constitutional right of access to the courts. Plainly there is a substantial nexus between the alleged injury and petitioners' acts, thus making *Linda R. S.* wholly inapposite. If there is a basis for denying respondents standing to bring their civil action, it is not to be found in *Linda R. S.*

Under the circumstances, plenary review is merited. Accordingly, I dissent.

CALIFORNIA EX REL. COOPER, CITY ATTORNEY OF SANTA ANA, CALIFORNIA *v.* MITCHELL BROTHERS' SANTA ANA THEATER ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

No. 81-271. Decided November 30, 1981

Held: A city, in a public nuisance abatement action against a motion picture theater, is not required, as a matter of constitutional law, to establish the obscenity of the motion pictures at issue by proof "beyond a reasonable doubt." While a State may require such proof in such a case, that choice is solely a matter of state law and is not required by the First and Fourteenth Amendments. Although this Court has held that the "clear and convincing" standard or one of its variants is the appropriate standard of proof in certain types of civil cases, it has never required application of the "beyond a reasonable doubt" standard in a civil case as opposed to a criminal prosecution.

Certiorari granted; 114 Cal. App. 3d 923, 171 Cal. Rptr. 85, reversed and remanded.

PER CURIAM.

The petition for certiorari is granted limited to Question 2 presented in the petition, namely, whether a city, in a public nuisance abatement action brought against a motion picture theater, must prove beyond a reasonable doubt that the motion pictures at issue are obscene.[1]

The Santa Ana City Attorney brought this action against respondents to abate a public nuisance pursuant to Cal. Civ. Proc. Code Ann. § 731 (West 1980).[2] The com-

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[1] The petition is otherwise denied.

[2] Section 731 provides in pertinent part:

"An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be

plaint alleged that numerous films shown by the respondents were obscene and thus constituted a public nuisance as defined by Cal. Civ. Code Ann. §§ 3479, 3480 (West 1970).[3] The complaint sought, *inter alia*, court approval of a resolution passed by the Santa Ana City Council revoking all of respondents' operating licenses and permits, a permanent injunction forbidding respondents to show the films named in the complaint, and a 1-year closure of respondents' theater.

The trial court determined that the complaint presented both equitable and legal issues and ordered that a jury trial be held on the issues of obscenity, public nuisance, and damages prior to resolution of the equitable issues by the court. The jury trial was divided into liability and damages stages. After the evidence pertaining to obscenity and public nuisance had been presented, the jury was instructed that they could find the films at issue to be obscene only if they were persuaded of such "beyond a reasonable doubt." The jury found 11 films obscene, 4 not obscene, and was unable to reach a verdict on 2 others.

Following a jury determination of damages, the court is-

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brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, . . . by the city attorney of any town or city in which such nuisance exists . . . ."

[3] Sections 3479 and 3480 provide in pertinent part:

"§ 3479. . . . Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, . . . is a nuisance."

"§ 3480. . . . A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

See also *People ex rel. Busch* v. *Projection Room Theater*, 17 Cal. 3d 42, 49, 550 P. 2d 600, 603–604 (exhibition of obscene films may be characterized as "indecent" or "offensive to the senses"), cert. denied *sub nom. Van de Kamp* v. *Projection Room Theater*, 429 U. S. 922 (1976).

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sued findings of fact and conclusions of law with respect to the equitable issues. The court found, independently from the jury verdict and based upon its own viewing, that the same 11 films were obscene beyond a reasonable doubt as the term obscene is defined in Cal. Penal Code Ann. § 311(a) (West 1970).[4] There were cross-appeals, the city asserting, among other things, that the trial court erred in imposing the beyond-reasonable-doubt burden of proof. The California Court of Appeal affirmed on this issue. Relying on this Court's observation that "the regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance," *Vance* v. *Universal Amusement Co.*, 445 U. S. 308, 315 (1980) *(per curiam)*, and JUSTICE BRENNAN's statement that "the hazards to First Amendment freedoms inhering in the regulation of obscenity require that even in . . . a civil proceeding, the State comply with the more exacting standard of proof beyond a reasonable doubt," *McKinney* v. *Alabama*, 424 U. S. 669, 683–684 (1976) (concurring opinion), the court concluded that "one of the required procedures is that obscenity be proved beyond a reasonable doubt."[5] *People ex rel. Gow* v. *Mitchell Bros.' Santa Ana Theater*, 114 Cal. App. 3d 923, 936, 171 Cal. Rptr. 85, 93 (1981). We reverse.

The purpose of a standard of proof is "to instruct the factfinder concerning the degree of confidence our society

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[4] Section 311(a) reads:

"'Obscene matter' means matter, taken as a whole, the predominant appeal of which is to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance."

[5] The court's conclusion rested solely on federal grounds; no state authority was cited for the proposition that obscenity must be proved beyond a reasonable doubt.

thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U. S. 358, 370 (1970) (Harlan, J., concurring). Three standards of proof are generally recognized, ranging from the "preponderance of the evidence" standard employed in most civil cases, to the "clear and convincing"[6] standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilt be proved "beyond a reasonable doubt" in a criminal prosecution. See *Addington* v. *Texas*, 441 U. S. 418, 423–424 (1979). This Court has, on several occasions, held that the "clear and convincing" standard or one of its variants is the appropriate standard of proof in a particular civil case. See *Addington* v. *Texas*, *supra*, at 431 (civil commitment); *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 52 (1971) (libel); *Woodby* v. *INS*, 385 U. S. 276, 285 (1966) (deportation); *Chaunt* v. *United States*, 364 U. S. 350, 353 (1960) (denaturalization); *Schneiderman* v. *United States*, 320 U. S. 118, 159 (1943) (denaturalization). However, the Court has never required the "beyond a reasonable doubt" standard to be applied in a civil case. "This unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the 'moral force of the criminal law,' *In re Winship*, 397 U. S., at 364, and we should hesitate to apply it too broadly or casually in noncriminal cases." *Addington* v. *Texas*, *supra*, at 428.

Thus while a State may require proof beyond reasonable doubt in an obscenity case, that choice is solely a matter of state law. The First and Fourteenth Amendments do not

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[6] The precise verbal formulation of this standard varies, and phrases such as "clear and convincing," "clear, cogent, and convincing," and "clear, unequivocal, and convincing" have all been used to require a plaintiff to prove his case to a higher probability than is required by the preponderance-of-the-evidence standard. C. McCormick, Evidence § 320, p. 679 (1954). See also Kaplan, Decision Theory and the Factfinding Process, 20 Stan. L. Rev. 1065, 1072 (1968).

require such a standard. The judgment of the Court of Appeal is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Although I adhere to my view that a State may not constitutionally suppress sexually oriented films except perhaps as necessary to shield juveniles or unconsenting adults, see, *e. g.*, *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 73 (1973) (BRENNAN, J., dissenting), since the State alone has petitioned for review in this case, I concur in limiting the grant of certiorari to consideration of whether the State must demonstrate beyond a reasonable doubt that communication it seeks to suppress is obscene. I share, however, JUSTICE STEVENS' concern, *post*, at 97, that we lack the requisite assurance of our jurisdiction to consider this question and join his suggestion that we adhere to our ordinary practice of denying the writ or of remanding to the state court for a determination of whether the decison below rests on a federal or a state ground. *California* v. *Krivda*, 409 U. S. 33 (1972).

Alternatively, assuming we have jurisdiction in this case, I dissent from the Court's holding that the First Amendment does not require the State when it seeks to suppress otherwise constitutionally protected material to prove that material obscene beyond a reasonable doubt. My reasons are stated in my concurring opinion in *McKinney* v. *Alabama*, 424 U. S. 669, 683–687 (1976).

JUSTICE STEVENS, dissenting.

Without the benefit of full briefs and arguments I would not answer the question whether the First Amendment requires that obscenity be proved beyond a reasonable doubt in

a public nuisance abatement action.[1] JUSTICE BRENNAN's opinion in *McKinney* v. *Alabama*, 424 U. S. 669, 683–687, in which Justice Stewart and JUSTICE MARSHALL joined, demonstrates the substantiality of the question. It is distressing to find that the Court considers novel questions of this character so easy as not even to merit argument.[2] It is also surprising to find the Court reaching out to decide such a question when its jurisdiction to do so is doubtful and when the absence of conflict on the question normally would call for a routine denial of certiorari.

I

In this public nuisance abatement action the California Superior Court and the California Court of Appeal concluded that obscenity must be proved beyond a reasonable doubt. See *People ex rel. Gow* v. *Mitchell Brothers' Santa Ana Theater*, 114 Cal. App. 3d 923, 935–937, 171 Cal. Rptr. 85, 92–93

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[1] Cf. *Snepp* v. *United States*, 444 U. S. 507, 516 (STEVENS, J., dissenting).

[2] When the State prohibits its citizens from purchasing books they want to read or entering theaters to view motion pictures they want to see, it engages in a form of censorship. The task of the censor cannot be performed without examining the content of the communication under scrutiny. Although a majority of the Court has stoutly and repeatedly denied that government has any power to draw distinctions based on the content of any expression, see the separate opinions in *FCC* v. *Pacifica Foundation*, 438 U. S. 726, and in *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, today the Court holds that the California courts were unnecessarily concerned that the censor's content-based scrutiny might result in the prohibition of protected communication. The holding seems to rest on an assumption that, no matter what the consequences of a civil lawsuit may be, the Constitution does not require the plaintiff to satisfy the reasonable-doubt standard of proof. If the Court is endorsing that broad assumption today, then this decision is far more important than even the substantial question presented for review would indicate. If the Court does not intend to endorse such a broad premise, its opinion should respond to the arguments advanced by JUSTICE BRENNAN, Justice Stewart, and JUSTICE MARSHALL in *McKinney*.

(1981). Without deciding whether the First Amendment imposes *any* special standard of proof on the censorship of allegedly obscene materials, the Court today opines that proof beyond a reasonable doubt is not constitutionally required. The Court has no jurisdiction to express that opinion unless the California courts imposed that standard because they understood it to be required by federal law. It is by no means clear that they did so.

State courts surely know the difference between opinions that merely contain persuasive reasoning and opinions that are authoritative because they explain a ruling that is binding on lower courts. Moreover, absent a definitive ruling from a higher tribunal, state courts are entitled to fashion state rules of procedure to govern the conduct of civil trials in state courts. Until today, this Court has never expressed an opinion on the standard of proof that a trial court should impose on a civil litigant seeking to prove that a motion picture film is obscene.

The explanation by the California Court of Appeal of its ruling on the standard-of-proof issue does not indicate that the court considered itself bound to follow any decision by this Court. As the Court of Appeal explained, the trial judge "established the high burden of proof based on the reasoning of Mr. Justice Brennan's concurring opinion in *McKinney* v. *Alabama*, *supra*, 424 U. S. 669, 678." *Id.*, at 935, 171 Cal. Rptr., at 92. After citing *People* v. *Frangadakis*, 184 Cal. App. 2d 540, 550, 7 Cal. Rptr. 776, 782 (1960),[3] and rejecting the City Attorney's argument that the standard of proof required in normal public nuisance abatement actions should be applied in an obscenity case, the California Court of Appeal stated that it "agree[d]" with the burden of proof portion of JUSTICE BRENNAN's opinion and found one passage

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[3] In that case the court held that the standard of proof in an action to abate a public nuisance under California Business and Professional Code § 25604 is by a preponderence of the evidence.

"particularly persuasive." 114 Cal. App. 3d, at 936, 171 Cal. Rptr., at 93.[4]

The state court's opinion may be construed in either of two ways. On the one hand, because the Court of Appeal agreed with the reasoning in JUSTICE BRENNAN's opinion, it may merely have established the procedural rule to be followed in the state courts subject to its jurisdiction.[5] On the other hand, it may have assumed that a lesser burden would have complied with state law but nevertheless ruled as it did because it believed the Federal Constitution required that result. When this sort of ambiguity is present, our jurisdiction is doubtful and we have a duty to withhold decision on the merits until we are able "to say with requisite assurance that this Court has jurisdiction in the premises." *Mental Hygiene Dept. of Cal.* v. *Kirchner*, 380 U. S. 194, 196.

As Justice Harlan emphasized in that case:

> "This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal

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[4] Contrary to the Court's characterization, *ante*, at 92, the Court of Appeal did not hold that *Vance* v. *Universal Amusement Co.*, 445 U. S. 308, compelled its conclusion "that one of the required procedures is that obscenity be proved beyond a reasonable doubt." 114 Cal. App. 3d, at 936, 171 Cal. Rptr., at 93. Rather, the court cited and quoted from *Vance* in the course of its rejection of the city's argument that a statement towards the end of this Court's long opinion in *Mugler* v. *Kansas*, 123 U. S. 623, 673, "support[s] its position that the burden of proof should be by 'clear and convincing evidence.'" 114 Cal. App. 3d, at 935, 171 Cal. Rptr., at 92. Since the argument based on *Mugler* is meritless, it is a mistake to attach undue significance to the court's response to that argument.

[5] The reasonable-doubt standard is no stranger to civil litigation. See, *e. g.*, cases cited in 9 J. Wigmore, Evidence § 2498, nn. 2–12 (J. Chadbourn rev. 1981). This Court has even used the standard in several civil contexts. See *Radio Corporation of America* v. *Radio Engineering Laboratories, Inc.*, 293 U. S. 1, 7–8 (invalidity of patent); *Ward & Gow* v. *Krinsky*, 259 U. S. 503, 522 (constitutional invalidity of state statute); *Moore* v. *Crawford*, 130 U. S. 122, 134 (invalidity of title); cf. *Fidelity Mutual Life Assn.* v. *Mettler*, 185 U. S. 308, 317.

> question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case. Were we to assume that the federal question was the basis for the decision below, it is clear that the California Supreme Court, either on remand or in another case presenting the same issues, could inform us that its opinion was in fact based, at least in part, on the California Constitution, thus leaving the result untouched by whatever conclusions this Court might have reached on the merits of the federal question." *Id.*, at 197 (footnote omitted).

Later in the opinion, Justice Harlan emphasized that we must be able to say with "certainty that the California judgment rested *solely* on [a federal ground]," *id.*, at 200 (emphasis in original), before we may take jurisdiction of a case coming from a state court.

Unless a case presents a question of unusual importance, jurisdictional doubt of this character normally leads to the dismissal of the writ of certiorari as improvidently granted, or to its denial if the petition is still pending. *Id.*, at 200–201. If the issue is sufficiently important, our practice is to remand to the state court to make sure that its decision rested solely on a state ground before we proceed further. See, *e. g.*, *California* v. *Krivda*, 409 U. S. 33. Whether one regards this as an important or an unimportant case, surely we should not simply ignore the customary restraints on the exercise of our limited jurisdiction over state courts.

II

Entirely apart from the jurisdictional question, adherence to the Court's traditional practice of avoiding the unnecessary and premature adjudication of constitutional questions counsels denial of this certiorari petition. As a practical matter, what is at stake is the City Attorney's request for a retrial of the question whether 17 rather than just 11 motion

picture films are obscene. No conflict between the ruling of the California Court of Appeal and that of any other court has been called to our attention. Even if one intermediate appellate court has given greater constitutional protection to some citizens of California than this Court would require, that is hardly a sufficient reason for reviewing the state court's decision.[6] No pressing need for the exercise of our jurisdiction at this time is apparent to me.

Accordingly, I respectfully dissent from the decision to grant certiorari and to decide the case summarily.

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[6] See *Idaho Dept. of Employment* v. *Smith*, 434 U. S. 100, 103–105 (STEVENS, J., dissenting in part).

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., ET AL. *v.* McNARY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80–427. Argued October 5, 1981—Decided December 1, 1981

Held: The principle of comity bars taxpayers' damages actions brought in federal courts under 42 U. S. C. § 1983 to redress the allegedly unconstitutional administration of a state tax system. Because the principle of comity bars federal courts from granting damages relief in such cases, it is not necessary to decide whether the Tax Injunction Act, standing alone, would bar such actions. Pp. 107–117.

(a) Prior to enactment in 1937 of the Tax Injunction Act—which prohibits district courts from enjoining, suspending, or restraining the assessment, levy, or collection of any state tax where a plain, speedy, and efficient remedy may be had in state courts—this Court's decisions in cases seeking federal-court equitable relief against state taxation (handed down both before and after the enactment in 1871 of 42 U. S. C. § 1983's predecessor) recognized that the doctrine of equitable restraint when remedies at law are adequate was particularly applicable in suits challenging the constitutionality of state tax laws because of the delicate balance between the federal authority and state governments, and the concomitant respect that should be accorded state tax laws in federal court. Pp. 107–109.

(b) The legislative history of the Tax Injunction Act does not suggest that Congress intended that federal-court deference in state tax matters be limited to the actions enumerated in the Act. Thus, the principle of comity which predated the Act was not restricted by its passage. Pp. 109–110.

(c) The post-Act vitality of the comity principle is demonstrated by this Court's 1943 decision in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, that federal courts may not render declaratory judgments as to the constitutionality of state tax laws. Although the Act was raised as a possible bar to the suit (as it has been raised in this case), it was found to be unnecessary to determine whether the Act could be construed to prohibit declaratory relief. The decision was based instead on principles of federalism and the necessity of federal-court respect for state taxing schemes, thus demonstrating not only the post-Act vitality of the comity principle, but also its applicability to actions seeking a remedy other than injunctive relief. Pp. 110–111.

(d) Damages actions under § 1983 would be no less disruptive of state tax systems than actions to enjoin the collection of taxes. Recovery of damages under § 1983 would first require a determination of the unconstitutionality of the state tax scheme that would be fully as intrusive as the equitable actions that are barred by comity principles. Moreover, the intrusiveness of such § 1983 actions would be exacerbated by the doctrine of *Monroe* v. *Pape*, 365 U. S. 167, authorizing immediate resort to a federal court under § 1983—without first exhausting state remedies—whenever state actions allegedly infringe constitutional rights. In addition to the intrusiveness of the judgment, the very maintenance of the suit itself would intrude on the enforcement of the state scheme. Pp. 113–115.

622 F. 2d 415, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, STEVENS, and O'CONNOR, JJ., joined, *post*, p. 117.

David J. Newburger argued the cause for petitioners. With him on the briefs were *Susan Spiegel*, *Steve Vossmeyer*, and *James P. Gamble*.

Thomas W. Wehrle argued the cause for respondents. With him on the brief for respondents McNary et al. was *Andrew J. Minardi*. *John Ashcroft* and *Michael L. Boicourt* filed a brief for respondents Williams et al.*

JUSTICE REHNQUIST delivered the opinion of the Court.

In this action we are required to reconcile two somewhat intermittent and conflicting lines of authority as to whether a damages action may be brought under 42 U. S. C. § 1983 to redress the allegedly unconstitutional administration of a state tax system. The United States District Court for the Eastern District of Missouri held that such suits were barred by both 28 U. S. C. § 1341 (Tax Injunction Act) and the prin-

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**John J. Enright*, *William J. Costello*, *Eugene L. Griffin*, and *Michael F. Baccash* filed a brief for the International Association of Assessing Officers as *amicus curiae*.

ciple of comity, and the Court of Appeals for the Eighth Circuit affirmed by an equally divided court sitting en banc.[1] We granted certiorari to resolve a conflict among the Courts of Appeals,[2] 450 U. S. 1039, and we now affirm. Before setting forth the facts, we think that a description of the past and at times divergent decisions of this Court may shed light upon the proper disposition of this case.

I

This Court, even before the enactment of § 1983, recognized the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems. As Justice Field wrote for the Court shortly before the enactment of § 1983:

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public." *Dows* v. *Chicago*, 11 Wall. 108, 110 (1871).

After this Court conclusively decided that federal courts *may* enjoin state officers from enforcing an unconstitutional state law, *Ex parte Young*, 209 U. S. 123 (1908), Congress also recognized that the autonomy and fiscal stability of the

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[1] *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 478 F. Supp. 1231 (1979), aff'd, 622 F. 2d 415 (1980).

[2] Compare *Fulton Market Storage Co.* v. *Cullerton*, 582 F. 2d 1071 (CA7 1978), cert. denied, 439 U. S. 1121 (1979), with *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, *supra*; *Ludwin* v. *City of Cambridge*, 592 F. 2d 606 (CA1 1979); and *Bland* v. *McHann*, 463 F. 2d 21 (CA5 1972), cert. denied, 410 U. S. 966 (1973).

States survive best when state tax systems are not subject to scrutiny in federal courts. Thus, in 1937 Congress provided:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. § 1341 (hereinafter § 1341 or Act).

This legislation, and the decisions of this Court which preceded it, reflect the fundamental principle of comity between federal courts and state governments that is essential to "Our Federalism," particularly in the area of state taxation. See, *e. g.*, *Matthews* v. *Rodgers*, 284 U. S. 521 (1932); *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481 (1913); *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276 (1909). Even after enactment of § 1341 it was upon this comity that we relied in holding that federal courts, in exercising the discretion that attends requests for equitable relief, may not even render declaratory judgments as to the constitutionality of state tax laws. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943).

Contrasted with this statute and line of cases are our holdings with respect to 42 U. S. C. § 1983. In 1871, shortly after Justice Field wrote of the vital and vulnerable nature of state tax systems, Congress enacted § 1983 with its familiar language:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Obviously § 1983 cut a broad swath. By its terms it gave a federal cause of action to prisoners, taxpayers, or anyone else

who was able to prove that his constitutional or federal rights had been denied by any State. In addition, the statute made no mention of any requirement that state remedies be exhausted before resort to the federal courts could be had under 28 U. S. C. § 1343.[3] The combined effect of this newly created federal cause of action and the absence of an express exhaustion requirement was not immediately realized. It was not until our decision in *Monroe* v. *Pape*, 365 U. S. 167 (1961), that § 1983 was held to authorize immediate resort to a federal court whenever state actions allegedly infringed constitutional rights:

> "Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U. S., at 183.

The immediacy of federal relief under § 1983 was reemphasized in *McNeese* v. *Board of Education*, 373 U. S. 668 (1963), where the Court stated: "It is immaterial whether [the state official's] conduct is legal or illegal as a matter of state law. Such claims are entitled to be adjudicated in the federal courts." *Id.*, at 674 (citation and footnote omitted). And in the unargued *per curiam* opinion of *Wilwording* v.

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[3] We held in *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600 (1979), that 28 U. S. C. § 1343, the jurisdictional counterpart of 42 U. S. C. § 1983, was narrower in scope than the latter. Because there can be no doubt that a claim of denial of due process or equal protection under the Fourteenth Amendment, which these petitioners asserted, would come under the narrower construction of § 1343 adopted by the Court in *Chapman*, *supra*, it is unnecessary to pursue here the difference between § 1983 and § 1343.

Swenson, 404 U. S. 249 (1971), the Court concluded that "[p]etitioners were . . . entitled to have their actions treated as claims for relief under the Civil Rights Acts, not subject . . . to exhaustion requirements." *Id.*, at 251. See also *Damico* v. *California*, 389 U. S. 416 (1967); *Houghton* v. *Shafer*, 392 U. S. 639, 640 (1968); *Steffel* v. *Thompson*, 415 U. S. 452, 472–473 (1974).

Thus, we have two divergent lines of authority respecting access to federal courts for adjudication of the constitutionality of state laws. Both cannot govern this case. On one hand, § 1341, with its antecedent basis in the comity principle of *Matthews* v. *Rodgers*, *supra*, and *Boise Artesian Water Co.* v. *Boise City*, *supra*, bars at least federal injunctive challenges to state tax laws. Added to this authority is our decision in *Great Lakes Dredge & Dock Co.* v. *Huffman*, *supra*, holding that declaratory judgments are barred on the basis of comity. On the other hand is the doctrine originating in *Monroe* v. *Pape*, *supra*, that comity does not apply where § 1983 is involved, and that a litigant challenging the constitutionality of any state action may proceed directly to federal court. With this divergence of views in mind, we turn now to the facts of this case, a § 1983 challenge to the administration of state tax laws which implicates both lines of authority. We hold that at least as to such actions, which is all we need decide here, the principle of comity controls.

II

Petitioner Fair Assessment in Real Estate Association is a nonprofit corporation formed by taxpayers in St. Louis County (County) to promote equitable enforcement of property tax laws in Missouri. Petitioners J. David and Lynn F. Cassilly own real property with recent improvements in the County. Petitioners filed suit under § 1983 alleging that respondents, the County's Tax Assessors, Supervisors, and Director of Revenue, and three members of the Missouri State

Tax Commission, had deprived them of equal protection and due process of law by unequal taxation of real property.

The complaint focuses on two specific practices by respondents. First, petitioners allege that County properties with new improvements are assessed at approximately 33⅓% of their current market value, while properties without new improvements are assessed at approximately 22% of their current market value. This disparity allegedly results from respondents' failure to reassess old property on a regular basis, the last general reassessment having occurred in 1960. Second, petitioners allege that property owners who successfully appeal their property assessments, as did the Cassillys in 1977, are specifically targeted for reassessment the next year.

Petitioners have previously sought some relief from respondents' assessments in state proceedings. In 1975, petitioner David Cassilly and others brought an action in which the State Circuit Court ordered respondent Antonio to reassess all real property in the County. On direct appeal, however, the Missouri Supreme Court reversed on the ground that the State Tax Commission, not the Circuit Court, should supervise the reassessment process. *State ex rel. Cassilly* v. *Riney*, 576 S. W. 2d 325 (1979) (en banc). In 1977, the Cassillys appealed the tax assessed on their home to the County Board of Equalization and received a reduction in assessed value from 33⅓% to 29%. When their home was again assessed at 33⅓% in 1978, the Cassillys once more appealed to the Board of Equalization. That appeal was pending at the commencement of this litigation.

The Cassillys brought this § 1983 action in federal court seeking actual damages in the amount of overassessments from 1975 to 1979, and punitive damages of $75,000 from each respondent. Petitioner Fair Assessment sought actual damages in the amount of expenses incurred in efforts to obtain equitable property assessments for its members. As in all other § 1983 actions, the award of such damages would first

require a federal-court declaration that respondents, in administering the state tax, violated petitioners' constitutional rights.

III

As indicated by our discussion in Part I, § 1341 and our comity cases have thus far barred federal courts from granting injunctive and declaratory relief in state tax cases. Because we decide today that the principle of comity bars federal courts from granting damages relief in such cases, we do not decide whether that Act, standing alone, would require such a result.[4] The correctness of the result in this case is demonstrated by an examination of the pre-Act decisions of this Court, the legislative history of the Act, our post-Act decision in the *Great Lakes* case, and more recent recognition of the principles of federalism.

A

Prior to enactment of § 1341, virtually all federal cases challenging state taxation sought equitable relief.[5] Conse-

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[4] The result we reach today was foreshadowed by our decision last Term in *Rosewell* v. *LaSalle National Bank*, 450 U. S. 503 (1981), wherein we stated that "even where the Tax Injunction Act would not bar federal-court interference in state tax administration, principles of federal equity may nevertheless counsel the withholding of relief. See *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 301 (1943)." *Id.*, at 525–526, n. 33. We need not decide in this case whether the comity spoken of would also bar a claim under § 1983 which requires no scrutiny whatever of state tax assessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race.

[5] Of course, the Court had not yet broadly interpreted the Civil Rights Act to permit federal damages actions for state violations of constitutional rights, brought prior to exhaustion of state remedies. See *Monroe* v. *Pape*, 365 U. S. 167 (1961). The closest pre-Act case to a federal damages action was a suit for refund of state taxes allegedly assessed in violation of the Fourteenth Amendment. *First National Bank* v. *Board of County Commissioners*, 264 U. S. 450 (1924). Consistent with the federal-court deference for state tax matters of which we speak today, the Court held

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quently, federal-court restraint in state tax matters was based upon the traditional doctrine that courts of equity will stay their hand when remedies at law are plain, adequate, and complete. See, *e. g.*, *Matthews* v. *Rodgers*, 284 U. S. 521 (1932); *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481 (1913); *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276 (1909). Even with this basis in equity law, these cases recognized that the doctrine of equitable restraint was of "notable application," *Boise Artesian Water Co.*, *supra*, at 281, and carried "peculiar force," *Matthews*, *supra*, at 525, in suits challenging the constitutionality of state tax laws. Such restraint was particularly appropriate because of the delicate balance between the federal authority and state governments, and the concomitant respect that should be accorded state tax laws in federal court. As the Court in *Matthews* explained:

> "The reason for this guiding principle [of equitable restraint] is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." 284 U. S., at 525.[6]

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that the action was barred by the parties' failure to exhaust their available state remedies. *Id.*, at 456. Although declaratory actions were available before 1937, they were seldom used. See Note, Federal Declaratory Judgments on the Validity of State Taxes, 50 Yale L. J. 927, 929–930, and n. 14 (1941).

[6] JUSTICE BRENNAN has cogently explained the reasons behind federal-court deference for state tax administration:

"The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpay-

Thus, in 1909 we could state that "[a]n examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired." *Boise Artesian Water Co., supra,* at 282.

B

This policy of equitable restraint based on notions of comity did not completely clear the federal courts of state tax cases. Indeed, the Senate Report on the bill that was to become § 1341 referred to "[t]he existing practice of the Federal courts in entertaining tax-injunction suits against State officers . . . ." S. Rep. No. 1035, 75th Cong., 1st Sess., 2 (1937). An examination of the cases of that era demonstrates, however, that this practice resulted not from a repudiation of the principle of comity, but from federal-court determinations that available state remedies did not adequately protect the federal rights asserted. See, *e. g.*, *Grosjean* v. *American Press Co.*, 297 U. S. 233, 242 (1936); *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145 (CA5), cert. denied, 298 U. S. 688 (1936). See also Note, Federal Court Interference with the Assessment and Collection of

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ers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts." *Perez* v. *Ledesma*, 401 U. S. 82, 128, n. 17 (1971) (concurring in part and dissenting in part).

State Taxes, 59 Harv. L. Rev. 780, 783, n. 13 (1946); Note, The Tax Injunction Act and Suits for Monetary Relief, 46 U. Chi. L. Rev. 736, 744, and nn. 40, 41 (1979).

Congress' response to this practice of the federal courts—enactment of § 1341—was motivated in large part by comity concerns. As we said of the Act just last Term:

> "The statute 'has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations.' *Tully* v. *Griffin, Inc.*, 429 U. S. [68,] 73 [(1976)]. This last consideration was the principal motivating force behind the Act: this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes. 81 Cong. Rec. 1415 (1937) (remarks of Sen. Bone) . . . ." *Rosewell* v. *LaSalle National Bank*, 450 U. S. 503, 522 (1981) (footnote omitted).

Neither the legislative history of the Act nor that of its precursor, 28 U. S. C. § 1342, suggests that Congress intended that federal-court deference in state tax matters be limited to the actions enumerated in those sections. See H. R. Rep. No. 1503, 75th Cong., 1st Sess., 1 (1937); 81 Cong. Rec. 1415 (1937) (remarks of Sen. Bone). Thus, the principle of comity which predated the Act was not restricted by its passage.

C

The post-Act vitality of the comity principle is perhaps best demonstrated by our decision in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943). Several Louisiana taxpayers brought an action in Federal District Court seeking a declaratory judgment that the state tax law as applied to them was unconstitutional and void. Although § 1341 was raised as a possible bar to the suit, as it has been raised in this case, "we [found] it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the inva-

lidity of a state tax." 319 U. S., at 299. Instead, "we [were] of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require[d] a like restraint in the use of the declaratory judgment procedure." *Ibid.* Those considerations were, of course, principles of federalism:

> "'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.' . . . Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of state taxes. These are the considerations of moment which have persuaded federal courts of equity to deny relief to the taxpayer . . . ." *Id.*, at 298 (quoting *Matthews* v. *Rodgers*, 284 U. S., at 525).

The Court's reliance in *Great Lakes* upon the necessity of federal-court respect for state taxing schemes demonstrates not only the post-Act vitality of the comity principle, but also its applicability to actions seeking a remedy other than injunctive relief. The focus was not on the specific form of relief requested, but on the fact that "in every practical sense [it] operate[d] to suspend collection of the state taxes until the litigation [was] ended." 319 U. S., at 299. As will be seen below, the relief sought in this case would have a similarly disruptive effect.

D

The principle of comity has been recognized and relied upon by this Court in several recent cases dealing with matters other than state taxes. Its fullest articulation was

given in the now familiar language of *Younger* v. *Harris*, 401 U. S. 37 (1971), a case in which we held that traditional principles of equitable restraint bar federal courts from enjoining pending state criminal prosecutions except under extraordinary circumstances:

> "Th[e] underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways. . . . [T]he concept [represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future." *Id.*, at 44–45.

The principles of federalism recognized in *Younger* have not been limited to federal-court interference in state criminal proceedings, but have been extended to some state civil actions. *E. g.*, *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975). Although these modern expressions of comity have been limited in their application to federal cases which seek to enjoin state judicial proceedings, a limitation which we do not abandon here, they illustrate the principles that bar petitioners' suit under § 1983. As we said in *Rosewell*, *supra*, "the reasons supporting federal noninterference [with state

taxation] are just as compelling today as they were in 1937." 450 U. S., at 527. As will be seen in the next part, petitioners' § 1983 action would be no less disruptive of Missouri's tax system than would the historic equitable efforts to enjoin the collection of taxes, efforts which were early held barred by considerations of comity.

IV

In arguments primarily addressed to the applicability of the Act, petitioners contend that damages actions are inherently less disruptive of state tax systems than injunctions or declaratory judgments, and therefore should not be barred by prior decisions of this Court. Petitioners emphasize that their § 1983 claim seeks recovery from individual state officers, not from state coffers, and that the doctrine of qualified immunity will protect such officers' good-faith actions and will thus avoid chilling their administration of the Missouri tax scheme.

We disagree. Petitioners will not recover damages under § 1983 unless a district court first determines that respondents' administration of the County tax system violated petitioners' constitutional rights. In effect, the district court must first enter a declaratory judgment like that barred in *Great Lakes*. We are convinced that such a determination would be fully as intrusive as the equitable actions that are barred by principles of comity.[7] Moreover, the intrusive-

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[7] Other federal courts have reached this same conclusion. For example, in *Advertiser Co.* v. *Wallace*, 446 F. Supp. 677, 680 (MD Ala. 1978), the court concluded that "[a]lthough perhaps less coercive than anticipatory relief and less intrusive than a refund, the damage award plaintiff seeks, especially its request for punitive damages, still is designed to deter collection of the taxes now being assessed by defendants." And the court in *Evangelical Catholic Communion, Inc.* v. *Thomas*, 373 F. Supp. 1342, 1344 (Vt. 1973), correctly stated:

"It is elementary that constitutional rights must be found to have been abridged in order for damages to be recovered in a civil rights action. Thus the plaintiffs in this action cannot recover damages without a deter-

ness of such § 1983 actions would be exacerbated by the nonexhaustion doctrine of *Monroe* v. *Pape*, 365 U. S. 167 (1961). Taxpayers such as petitioners would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety.

In addition to the intrusiveness of the judgment, the very maintenance of the suit itself would intrude on the enforcement of the state scheme. As the District Court in this case stated:

> "To allow such suits would cause disruption of the states' revenue collection systems equal to that caused by anticipatory relief. State tax collection officials could be summoned into federal court to defend their assessments against claims for refunds as well as prayers for punitive damages, merely on the assertion that the tax collected was willfully and maliciously discriminatory against a certain type of property. Allowance of such claims would result in this Court being a source of appellate review of all state property tax classifications." 478 F. Supp. 1231, 1233–1234 (1979).

This intrusion, although undoubtedly present in every § 1983 claim, is particularly highlighted by the facts of this case. Defendants are not one or two isolated administrators, but virtually every key tax official in St. Louis County. They include the County Executive, the Director of Revenue, the Tax Assessor, and three supervising members of the State Tax Commission. In addition, the actions challenged in the complaint—unequal assessment of new and

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mination by this court that the taxation of their Newbury property was effected in violation of their constitutional rights. If we were to make such a determination, we would, in effect, be issuing a declaratory judgment regarding the constitutionality of the tax levied on the plaintiffs. As the court is prohibited from issuing such a declaratory judgment, . . . the court is also precluded as a matter of law from adjudicating the plaintiffs' damages claims."

old property and retaliatory assessment of property belonging to those who successfully appeal to the Board of Equalization—may well be the result of policies or practicalities beyond the control of any individual officer. For example, failure annually to reassess old property may well result from a practical allocation of limited resources. In addition, according to respondents' attorney at oral argument, Missouri law requires that all property, including property which belongs to those who successfully appeal to the Board of Equalization, be assessed at 33⅓% of market value. Thus, a judicial determination of official liability for the acts complained of, even though necessarily based upon a finding of bad faith, would have an undeniable chilling effect upon the actions of all County officers governed by the same practicalities or required to implement the same policies. There is little doubt that such officials, faced with the prospect of personal liability to numerous taxpayers, not to mention the assessment of attorney's fees under 42 U. S. C. § 1988, would promptly cease the conduct found to have infringed petitioners' constitutional rights, whether or not those officials were acting in good faith. In short, petitioners' action would "in every practical sense operate to suspend collection of the state taxes . . . ," *Great Lakes*, 319 U. S., at 299, a form of federal-court interference previously rejected by this Court on principles of federalism.

V

This case is therefore controlled by principles articulated even before enactment of § 1983 and followed in later decisions such as *Matthews* and *Great Lakes*. The recovery of damages under the Civil Rights Act first requires a "declaration" or determination of the unconstitutionality of a state tax scheme that would halt its operation. And damages actions, no less than actions for an injunction, would hale state officers into federal court every time a taxpayer alleged the requisite elements of a § 1983 claim. We consider such interfer-

ence to be contrary to "[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts." *Matthews*, 284 U. S., at 525.

Therefore, despite the ready access to federal courts provided by *Monroe* and its progeny, we hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete,[8] and may ultimately seek review of the state decisions in this Court. See *Huffman* v. *Pursue, Inc.*, 420 U. S., at 605; *Matthews* v. *Rodgers*, *supra*, at 526.

The adequacy of available Missouri remedies is not at issue in this case. The District Court expressly found "that [petitioners] have means to rectify what they consider an unjust situation through the state's own processes," 478 F. Supp., at 1234, and petitioners do not contest this finding. In addition, the Missouri Supreme Court has expressly held that plaintiffs such as petitioners may assert a § 1983 claim in state court. See, *e. g.*, *Stafford* v. *Muster*, 582

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[8] We discern no significant difference, for purposes of the principles recognized in this case, between remedies which are "plain, adequate, and complete," as that phrase has been used in articulating the doctrine of equitable restraint, and those which are "plain, speedy and efficient," within the meaning of § 1341. See, *e. g.*, *Tully* v. *Griffin, Inc.*, 429 U. S. 68, 73–74 (1976); *Hillsborough* v. *Cromwell*, 326 U. S. 620, 622–623 (1946); *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S., at 297–299; *Matthews* v. *Rodgers*, 284 U. S., at 525–526. Both phrases refer to the obvious precept that plaintiffs seeking protection of federal rights in federal courts should be remitted to their state remedies if their federal rights will not thereby be lost. Numerous federal decisions have treated the adequacy of state remedies, and it is to that body of law that federal courts should look in seeking to determine the occasions for the comity spoken of today.

S. W. 2d 670, 681 (1979); *Shapiro* v. *Columbia Union National Bank & Trust Co.*, 576 S. W. 2d 310 (1978).

Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE STEVENS, and JUSTICE O'CONNOR join, concurring in the judgment.

I agree that the judgment of the District Court dismissing petitioners' complaint should be affirmed. But I arrive at that conclusion by a different route for I cannot agree that this case, and the jurisdiction of the federal courts over an action for damages brought pursuant to express congressional authority, is to be governed by applying a "principle of comity" grounded solely on this Court's notion of an appropriate division of responsibility between the federal and state judicial systems. Subject only to constitutional constraints, it is exclusively Congress' responsibility to determine the jurisdiction of the federal courts. Federal courts have historically acted within their assigned jurisdiction in accordance with established principles respecting the prudent exercise of equitable power. But this practice lends no credence to the authority which the Court asserts today to renounce jurisdiction over an entire class of damages actions brought pursuant to 42 U. S. C. § 1983.

I

Petitioners J. David Cassilly and Lynn F. Cassilly are owners of real property in St. Louis County, Mo. Petitioner Fair Assessment in Real Estate Association, Inc. (FAIR), is a not-for-profit corporation formed by real estate taxpayers in St. Louis County to promote equitable enforcement of the real property tax laws of the State of Missouri. Respondents are public officials responsible for the execution of the real property tax laws in St. Louis County. On July 2, 1979,

petitioners filed this action in the United States District Court for the Eastern District of Missouri, pursuant to 42 U. S. C. § 1983, contending that respondents had willfully, intentionally, and systematically deprived them of their rights to due process and equal protection under the Fourteenth Amendment through inequitable property tax assessments. Petitioners alleged that respondents assessed properties with recent improvements at roughly 33⅓% of current true market value, and older homes on the average of 22½% of current market value. Further they alleged that respondents targeted for reassessment all real property upon which a successful appeal had been prosecuted in the prior year. The Cassillys sought compensatory damages measured by the difference between the taxes which they paid in several years prior to the action, and the amount they contended would have been owing had they been assessed at the average rate. They sought further compensation for expenses they had incurred in their sporadic attempts to remedy the alleged unlawful assessment by resort to the state administrative mechanisms, and substantial punitive damages against each respondent. FAIR sought money damages in the amount of expenses incurred in the course of its efforts to obtain equitable enforcement of the state real property tax law.

The District Court dismissed the complaint, holding that the action was barred by the Tax Injunction Act and principles of comity.[1] 478 F. Supp. 1231. The judgment of the District Court was affirmed by an equally divided vote of the Court of Appeals for the Eighth Circuit sitting en banc. 622 F. 2d 415.

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[1] The court focused on the claims of the Cassillys, the individual petitioners, dismissing FAIR's complaint because it is "obviously in the same position as the individual plaintiffs." Petitioners do not challenge that determination in this Court, but rather concede that the "case turns" solely on the claims of the individuals. Reply Brief for Petitioners 4, n. 2; Brief for Petitioners 8.

II

The opinion for the Court sets the "principle of comity" against the strong policies of 42 U. S. C. § 1983 favoring a federal forum to vindicate deprivations of federal rights, and resolves the issue in favor of comity. In my view, there is no conflict here that could conceivably justify the unprecedented step of renouncing our assigned jurisdiction. Indeed the very cases relied on by the Court in its attempt to find some historic source for its sweeping view of the "principle of comity," reveal the limits of that principle as a source of judicial authority.

As employed by the Court in several recent opinions, and in the opinion of the Court today, the "principle of comity" refers to the "proper respect for state functions" that organs of the National Government, most particularly the federal courts, are expected to demonstrate in the exercise of their own legitimate powers. See *Younger* v. *Harris*, 401 U. S. 37, 44–45 (1971). So employed, the "principle of comity" is nothing more than an encapsulation of policy, albeit policy with roots in the Constitution and our federal system of government.[2]

While the "principle of comity" may be a source of judicial policy, it is emphatically no source of judicial *power* to renounce jurisdiction.[3] The application of the comity principle

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[2] To recognize the nature of the principle does not, of course, detract from the fact that its manifestations can be clearly seen in the cases of this Court, and in the Acts of Congress, long before *Younger* v. *Harris*. Indeed, the historic treatment of state tax litigation in the cases of this Court, and in Congress, provides an excellent illustration of the settled scope of the comity principle as a source of both judicial and congressional doctrine. The Court's failure today to acknowledge the substantive limits of the principle may in part be the product of the fact that the "principle of comity" is not at all tied to concrete language in any constitutional or statutory provision. See L. Tribe, American Constitutional Law § 3–41 (1978).

[3] The distinction between federal court jurisdiction and the exercise of equitable power did not escape Chief Justice Stone writing for the Court in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943):

has thus been limited to a relatively narrow class of cases: Only where a federal court is asked to employ its historic powers as a court of equity, and is called upon to decide whether to exercise the broadest and potentially most intrusive form of judicial authority, does "comity" have an established and substantial role in informing the exercise of the court's discretion.[4] There is little room for the "principle of

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"This Court has recognized that the federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding *the extraordinary* relief which they may afford, will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer. *This withholding of extraordinary relief by courts having the authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts* . . . . On the contrary, it is but a recognition that the jurisdiction conferred on the federal courts embraces suits in equity as well as law, and that a federal court of equity, which may in an appropriate case refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest, should stay its hand in the public interest when it reasonably appears that private interests will not suffer.

"It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." *Id.*, at 297–298 (citations omitted; emphasis added).

[4] "Abstention" is often cited as an application of the comity principle. See, *e. g.*, Wells, The Role of Comity in the Law of Federal Courts, 60 N. C. L. Rev. 59, 63–68 (1981). Not surprisingly then, we have applied the abstention doctrine only in equity actions. See *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 500 (1941) ("The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication"); *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 318 (1943) ("as a matter of sound equitable discretion").

In *Pullman*, the Court described the equitable origins of the rule:

"An appeal to the chancellor . . . is an appeal to the 'exercise of the sound discretion which guides the determination of courts of equity'. . . . The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. . . . Few public interests have a higher claim upon the discretion of a federal

comity" in actions at law where, apart from matters of administration, judicial discretion is at a minimum.[5] Surely no judicial power to fashion novel doctrine concerning the jurisdiction of the federal courts is to be found in the Constitution itself, which provides that the judicial power "shall be vested

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chancellor than the avoidance of needless friction with state policies . . . ." 312 U. S., at 500.

But even assuming "abstention" might have some application in actions at law, cf. *Clay* v. *Sun Insurance Office Ltd.*, 363 U. S. 207 (1960) (certifying a question to the state court in a legal action), it is quite clear that the doctrine would not extend so far as wholly to deprive the litigant of his federal forum. The abstention doctrines are founded on the recognition that state, not federal, courts are the final expositors of state law, and thus reflect a justifiable diffidence on the part of federal courts confronted with novel state law questions.

Abstention is thus narrowly drawn to meet the particularized need it serves. The federal court remains open to the litigant to present his federal claim should the action for which he is remitted to state court fail to afford relief. *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964). See also *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25, 29 (1959) ("This course does not constitute abnegation of judicial duty. On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition").

Principles of comity are also reflected in federal habeas practice. While current habeas jurisdiction is wholly a statutory matter, 28 U. S. C. § 2254, comity surely played a part in the development of the exhaustion requirement. See *Ex parte Royall*, 117 U. S. 241 (1886). But the judicial creation of that requirement reflected no usurpation of judicial power. Issuance of the Great Writ was historically regarded as a matter of equitable discretion. See *Fay* v. *Noia*, 372 U. S. 391, 438 (1963).

[5]This is not to suggest that there is no occasion to apply principles of comity in actions at law. The doctrine of exhaustion of administrative remedies, while based primarily on concerns of judicial administration, see *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51 (1938), and which reflects principles of avoidance of unnecessary litigation, deference to administrative expertise, and "notions of administrative autonomy," see *McKart* v. *United States*, 395 U. S. 185, 194–195 (1969), is surely broad enough to encompass comity concerns as well. Cf. *First National Bank of Greeley* v. *Board of Commissioners of Weld County*, 264 U. S. 450 (1924). But the role of comity must narrow with the scope of judicial discretion, and, in regard to suits seeking monetary relief, that discretion is limited.

in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." U. S. Const., Art. III, § 1.

The Court relies primarily on *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943), to support its sweeping view of the comity principle. *Great Lakes* presented the question whether the Tax Injunction Act could be "so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax." *Id.*, at 299. We found no need to address that question, holding instead that "those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure." *Ibid.* From this the Court today reasons:

> "Petitioners will not recover damages under § 1983 unless a district court first determines that respondents' administration of the County tax system violated petitioners' constitutional rights. In effect, the district court must first enter a declaratory judgment like that barred in *Great Lakes*. We are convinced that such a determination would be fully as intrusive as the equitable actions that are barred by principles of comity." *Ante*, at 113.

Great Lakes does not support this reasoning. Our opinion there suggests nothing intrusive in bringing a claim involving a question of state taxation to a federal forum. Dismissal of the suit was permissible only because the claim for declaratory relief was designed to gain "an adjudication of rights in anticipation of their threatened infringement."[6] Such a

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[6] The Court explained the equitable foundations of anticipatory relief:

"The jurisdiction of the district court in the present suit, praying an adjudication of rights in anticipation of their threatened infringement, is analogous to the equity jurisdiction . . . . Called upon to adjudicate what is essentially an equitable cause of action, the district court was as free as in

suit, precisely like one for an injunction, would "in every practical respect operate to suspend collection of the state taxes until the litigation is ended."[7] 319 U. S., at 299. No similar concern is raised by the present case.[8]

The jurisdiction of the federal courts over cases such as the present one reflects a considered congressional judgment. As the Court acknowledges, § 1983 "gave a federal cause of action to prisoners, taxpayers, or anyone else who was able to prove that his constitutional or federal rights had been denied by any State." *Ante*, at 103–104. In addition, 42 U. S. C. § 1981 provides that "[a]ll persons . . . shall be subject to like punishment, pains, penalties, *taxes*, licenses, and exactions of every kind, and to no other."[9] (Emphasis added.) Congress has expressly provided jurisdiction over such claims in the district courts.[10] 28 U. S. C. § 1343; see

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any other suit in equity to grant or withhold the relief prayed, upon equitable grounds." 319 U. S., at 300.

[7] A similar desire to ensure that state and local governments not be deprived of the use of tax proceeds until the lawfulness of the levy was finally determined, was largely responsible for enactment of the Tax Injunction Act. See *infra*, at 129–130, and n. 16.

[8] The Court suggests that if the District Court determines that the assessments in question here were unlawful, the state officials "would promptly cease the conduct found to have infringed petitioners' constitutional rights," and thus the determination of unlawfulness would operate to "suspend" collection of state taxes. *Ante*, at 115. But I would never have thought this result something to be avoided. The *Great Lakes* rule seeks to avoid withholding tax funds from local authorities until the tax is determined to be unlawful, not afterwards.

[9] The Civil Rights Act that became § 1981 was passed by Congress in 1868. The reference to "taxes" was added in 1870. See *County of San Mateo* v. *Southern Pacific R. Co.*, 13 F. 145, 151 (CC Cal. 1882) (Justice Field). At least one state tax case seeking a damages remedy has involved a claim under § 1981. *Garrett* v. *Bamford*, 538 F. 2d 63 (CA3 1976).

[10] Actions challenging the constitutionality of state taxation have also been held to fall within the general federal question jurisdiction, 28 U. S. C. § 1331. See, *e. g.*, *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 35 (1907) ("The claim that the action of the state board of equal-

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Zwickler v. *Koota*, 389 U. S. 241, 245–248 (1967).[11] Where Congress has granted the federal courts jurisdiction, we are not free to repudiate that authority. *Ibid.*;[12] *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964). In *England* we said:

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ization in making the assessment under consideration was the action of the State, and if carried out would violate the provisions of the Fourteenth Amendment to the Constitution of the United States, by taking property of the appellee without due process of law, and by failing to give it the equal protection of the laws, constitutes a Federal question beyond all controversy"); *County of San Mateo* v. *Southern Pacific R. Co.*, *supra*; *Louisville & N. R. Co.* v. *Bosworth*, 230 F. 191 (ED Ky. 1915).

[11] The jurisdictional grant reflects a congressional policy pronouncement on the role of the federal courts in our federal system. The Civil Rights Acts, passed between 1866 and 1875, and made federally cognizable by 28 U. S. C. § 1343(3), were followed by the Act of Mar. 3, 1875, which granted the federal courts jurisdiction over all federal statutory and constitutional questions where the requisite amount in controversy was met. § 1, 18 Stat. 470. It hardly disparages the current standing of the state courts as qualified adjudicators of federal rights exercising jurisdiction concurrent with that of the federal courts, to note that at the time of the enactment there was a more than modest distrust of the state courts as protectors of federal rights, see *Mitchum* v. *Foster*, 407 U. S. 225, 238–242 (1972), and that "[b]y that statute '. . . Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts ceased to be restricted tribunals of fair dealing between citizens of different states and became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" *Zwickler* v. *Koota*, 389 U. S. 241, 247 (1967) (emphasis in the opinion), quoting F. Frankfurter & J. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 65 (1927).

[12] We stated in *Zwickler*:

"Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . .' 'We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject

> "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred special categories of jurisdiction upon the federal courts, and with the principle that 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.' *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 40." *Id.*, at 415 (footnote omitted).

The power to control the jurisdiction of the lower federal courts is assigned by the Constitution to Congress, not to this Court. In its haste to rid the federal courts of a class of cases that it thinks unfit for federal scrutiny, the Court today departs from this fundamental precept.

III

Subject of course to constitutional constraints, the jurisdiction of the lower federal courts is subject to the plenary control of Congress. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233–234 (1922); *Cary* v. *Curtis*, 3 How. 236, 245 (1845). As pointed out *supra*, at 123–124, and n. 11, this case appears to fall squarely within the jurisdictional grant of 28 U. S. C. § 1343, and perhaps of 28 U. S. C. § 1331 as well. The question, then, is whether Congress has anywhere contradicted that presumptive grant of judicial author-

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for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.'" 389 U. S., at 248 (citations omitted).

ity. Only one possible source of that contradiction having been suggested, I begin my analysis of the jurisdictional question with the Tax Injunction Act itself.

A

Title 28 U. S. C. § 1341 provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

If a suit brought under § 1983 for damages is to come within the prohibition of the Act, it would seem necessary to demonstrate that such a suit is one to "enjoin, suspend or restrain the assessment, levy or collection" of a state tax. Respondents argue that the terms "suspend" and "restrain" are words of ordinary usage, and that they are sufficiently broad to bring the present suit for damages, which respondents assert will "chill" state tax collection, within the proscriptions of the Act. In my view, the legislative history of the Act, and the case law background against which it was written, directly refute the suggestion that Congress intended those words to have the encompassing meaning respondents suggest.[13]

B

The federal courts have for most of their history been scrupulous in the exercise of their equitable powers to avoid unnecessary interference with the administration of state taxation. In *Dows* v. *Chicago*, 11 Wall. 108 (1871), Justice Field noted:

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[13] I might also question whether these terms are totally devoid of specialized legal meaning, for they surely seem to evoke association with the language of equitable actions. See, *e. g.*, *Dows* v. *Chicago*, 11 Wall. 108, 110 (1871) ("No court of equity will . . . allow its injunction to issue to *restrain* their action . . .") (emphasis added); *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S., at 299 ("suspend collection of the state taxes until the litigation is ended").

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public." *Id.*, at 110.

Thus it was early held that the illegality or unconstitutionality of a state or municipal tax would not in itself provide the foundation for equitable relief in the federal courts. *Id.*, at 109; see *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 282–285 (1909).[14] Consistent with equity practice, the federal courts would not enjoin the collection of state taxes, despite the possible unconstitutionality of the exaction, where there existed a "plain, adequate and complete remedy at law." *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, 488 (1913).

Although this Court, in the many cases preceding passage of the Tax Injunction Act, affirmed the need for restraint in the exercise of the power of equity in state tax cases, it never intimated that the federal forum was inappropriate where the complaint sought only a remedy in damages, and the case was otherwise within federal jurisdiction. Indeed, the Court re-

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[14] To be cognizable in a court of equity, it was understood that "the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax." *State Railroad Tax Cases*, 92 U. S. 575, 614 (1876). The limitations of federal equity practice in 1876 intensified the need for restraint. Because the equity court was limited to enjoining the collection of the tax as a whole, the effect of injunctive relief was to allow the complainant to escape payment of all taxes due, even though the portion that reflected the lawful assessment should, in justice, have been paid. *Id.*, at 614–615.

peatedly stated the contrary. See *id.*, at 486; *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 127 (1930); *Chicago, B. & Q. R. Co.* v. *Osborne*, 265 U. S. 14, 16 (1924). For example, in *Henrietta Mills*, a unanimous Court concluded that there was no basis for equitable relief, relying on the fact that there would have been "an adequate remedy at law, not only in the state court, *but also in the Federal court if petitioner had been able to show a violation of the Federal Constitution.*" 281 U. S., at 127 (emphasis added). And indeed damages actions for wrongful collection of taxes, brought against both the taxing authority and the taxing officials, were not unknown to the lower federal courts. See, *e. g.*, *Tyler* v. *Dane County*, 289 F. 843 (WD Wis. 1923); *International Paper Co.* v. *Burrill*, 260 F. 664 (Mass. 1919). In *Matthews* v. *Rodgers*, 284 U. S. 521 (1932), only five years prior to the enactment of the Tax Injunction Act, we summarized the federal practice:

> "Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, . . . *or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present.*" *Id.*, at 525–526 (citations omitted; emphasis added).

In sum, while the federal courts, prior to the passage of the Tax Injunction Act, would frequently refrain from exercising their equitable powers in state tax cases, damages actions were an established fixture of federal jurisdiction.

C

Although in 1932 *Matthews* v. *Rodgers* stated a broad principle of restraint in the exercise of federal equity powers,

ibid., the rule was soon honored more in breach than in observance. Purporting to construe these equitable principles in state tax cases, the federal courts had become "free and easy with injunctions."[15] Thus federal remedial practice began to contrast sharply with the limits on state remedial authority, with the result that the federal court became the preferred forum for those who could properly invoke its jurisdiction: principally large out-of-state corporations. The legislative history of the Tax Injunction Act makes plain Con-

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[15] *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S., at 431 (Douglas, J., concurring).

Two features of federal equity practice explained this willingness to grant equitable relief. The first was the construction that this Court placed on the equitable maxim that equity jurisdiction does not lie where there exists an adequate legal remedy. The Court had held that the "adequate legal remedy" must be one cognizable *in federal court*. *City Bank Co.* v. *Schnader*, 291 U. S. 24, 29 (1934). Where the limitations on federal jurisdiction would preclude adjudication of the suit for monetary relief, either because of the mandate of the Eleventh Amendment, or otherwise, the barrier to federal injunctive intervention was thus removed. The States had for the most part denied their courts the power to grant anticipatory relief against the collection of taxes. See Culp, The Powers of a Court of Equity in State Tax Litigation, 38 Mich. L. Rev. 610, 618–631 (1940). It was this imbalance in the powers of the state and federal judicial systems that was "particularly remedied" by passage of the Tax Injunction Act. H. R. Rep. No. 1503, 75th Cong., 1st Sess., 3 (1937).

The second feature was that the federal courts, in construing strictly the requirement that the remedy available at law be "plain, adequate and complete," see *supra*, at 127, had frequently concluded that the procedures provided by the State were not adequate. See Note, Federal Court Interference with the Assessment and Collection of State Taxes, 59 Harv. L. Rev. 780, 782–783 (1946). The Tax Injunction Act set forth a more deferential standard by which to evaluate the adequacy of the state remedy. See *Rosewell* v. *LaSalle National Bank*, 450 U. S. 503 (1981). Thus, in this respect too, the Tax Injunction Act limited the equitable range of the district court and brought federal court practice more closely into line with that of state courts—which assuredly were required to act within the bounds of state law and procedure without regard to whether the federal courts considered that law and procedure "plain, adequate and complete."

gress' concern with this disparity, and its effect on local finances. In introducing the bill that ultimately became the Tax Injunction Act, Senator Bone explained:

> "The existing practice of the Federal courts to entertain tax-injunction suits make[s] it possible for foreign corporations [exercising the diversity jurisdiction] to withhold from a State and its governmental subdivisions taxes in such vast amounts and for such long periods as to disrupt State and county finances, and thus make it possible for such corporations to determine for themselves the amount of taxes they will pay." 81 Cong. Rec. 1416 (1937).

The Senate Report highlighted the nature of the problem being addressed:

> "[U]njust discrimination between citizens of the State and foreign corporations doing business in such State has been the cause of much controversy. *The controversies arising out of the use of the injunctive process in State tax cases would be eliminated by the passage of this bill.*" S. Rep. No. 1035, 75th Cong., 1st Sess., 2 (1937) (emphasis added).[16]

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[16] The Report further noted:

"It is the common practice for statutes of the various States to forbid actions in State courts to enjoin the collection of State and county taxes unless the tax law is invalid or the property is exempt from taxation, and these statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest. This type of State legislation makes it possible for the States and their various agencies to survive while long-drawn-out tax litigation is in progress. If those to whom the Federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair picture is presented of the citizen of the State being required to pay first and then litigate, while those privileged to sue in the Federal courts need only pay what they choose and withhold the balance during the period of litigation.

"The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corpora-

Not only does the legislative focus belie respondents' suggestion that Congress believed the federal courts not competent to handle matters involving state taxation, but the legislative history addresses directly respondents' principal contention that Congress intended the phrase "enjoin, suspend or restrain" to bar actions for monetary relief from the federal courts. The Report of the House Judiciary Committee appends a "Legal Brief" submitted to the Committee with respect to the proposed bill, which states:

> "You ask for some assistance on the question of whether the existence of an adequate remedy at law or in equity in the State courts, such as a tax-refund action, would prevent a foreign corporation pursuing the same remedy in the Federal court. In answer, *[sic]* will say that there might be circumstances under which the Federal courts would have no jurisdiction of such actions; for instance, where the refund action could be brought only against the State, or against the State officers under such circumstances as to amount to a suit against the State. Under the eleventh amendment to the Federal Constitution, of course, suits against the State, or suits which are in effect suits against the State, are not maintainable in the Federal courts.
>
> "But if the refund action is permitted by State legislation or rules of decision against counties or county officers, and the money refunded has not yet reached the State exchequer, such actions, if maintainable in the

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tions doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy." S. Rep. No. 1035, at 1–2.

State courts, could likewise be pursued in the Federal courts if the requisite elements of Federal jurisdiction existed." H. R. Rep. No. 1503, 75th Cong., 1st Sess., 2–3 (1937).[17]

The conclusion is thus inescapable that Congress did *not* intend to bar actions such as this one from the federal courts. On the contrary, Congress clearly intended that the federal forum would continue to remain available in state tax cases for monetary relief despite passage of the Tax Injunction Act.

D

As understood and applied by this Court prior to the passage of the Tax Injunction Act,[18] and by Congress in enacting the Tax Injunction Act, the "principle of comity" which demanded respect for state tax administration, extended precisely as far as was necessary to ensure that the federal courts not become party to the abuse of their equity power. Congress intended that federal authority be exercised with the same restraint that the States applied in the administration of their own tax system, and thus to restore the parity between the two judicial systems. But there is absolutely no support in either the cases of this Court, or in Congress'

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[17] The brief quotes from many of the cases discussed in Part III–B, *supra*, supporting the view that the federal forum would continue to be available.

To be sure, the House and Senate Reports focus on actions brought under diversity jurisdiction. But this emphasis merely reflects the fact that Congress was particularly concerned about the advantage conferred on out-of-state corporations by virtue of diversity jurisdiction. Just as it was unlikely that Congress, by enacting 28 U. S. C. § 1341, sought to limit federal equity power only in diversity cases, see *Rosewell* v. *LaSalle National Bank*, 450 U. S., at 522–523, n. 29, it is implausible that Congress wished to ensure the continued availability of diversity jurisdiction in actions at law, while implicity barring damages actions arising under the Constitution and laws of the United States.

[18] And in the cases that succeeded the Act. See *supra*, at 122–123.

action, for total abdication of federal power in this field. It is thus entirely clear that as a jurisdictional matter, the federal courts have jurisdiction over claims seeking monetary relief arising from unconstitutional state taxation.

IV

Petitioners argue that since their federal claim is brought pursuant to 42 U. S. C. § 1983, it was not necessary to exhaust administrative remedies before commencing this action.

In *First National Bank of Greeley* v. *Board of Commissioners of Weld County*, 264 U. S. 450 (1924), we held that before a litigant complaining of alleged overassessment of taxes may bring a damages action grounded on the Constitution or statutes of the United States, that litigant must fully exhaust any administrative remedies afforded by the State.[19] In *Weld County*, plaintiff in error brought its action under federal question jurisdiction to recover the amount of taxes levied for the years 1913 and 1914. It alleged that the taxes were assessed and collected in contravention of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and a federal statute[20] setting forth certain limitations

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[19] See *Apartments Bldg. Co.* v. *Smiley*, 32 F. 2d 142, 143 (CA8 1929). A like rule applied in equity actions. See *Gorham Mfg. Co.* v. *State Tax Comm'n*, 266 U. S. 265, 269–270 (1924); *First National Bank of Greenville* v. *Gildart*, 64 F. 2d 873, 874–875 (CA5 1933); *McDougal* v. *Mudge*, 233 F. 235, 237 (CA8 1916).

[20] Revised Statutes § 5219 allowed state and local taxation of the shares of a national bank "subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

on state and local taxation in regard to national banks.[21] The Court paused before addressing plaintiff in error's substantive claim:

> "We are met at the threshold of our consideration of the case with the contention that the plaintiff did not exhaust its remedies before the administrative boards and consequently cannot be heard by a judicial tribunal to assert the invalidity of the tax." *Id.*, at 453.

Because the plaintiff in error had not exhausted its state administrative remedies, the Court declined to consider the "question whether the tax [was] vulnerable to the challenge in respect of its validity upon any or all of the grounds set forth . . . ."[22] *Id.*, at 456.

Although the Court did not elaborate on the underpinnings of that holding, it seems clear that it was grounded on the considerations of sound judicial administration[23] and parity between the state and federal judicial systems that had his-

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[21] Plaintiff in error charged that the "banks of Weld county were assessed and compelled to pay upon a valuation grossly in excess of that put upon other property in the same county and likewise in excess of that put upon other banks in other counties of the State." 264 U. S., at 452–453.

[22] The exhaustion rule stated in *Weld County*, reflecting the established practice in state tax matters, was limited to exhaustion of *administrative*, but not *judicial*, remedies. See *id.*, at 456; Stason, Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies, 28 Mich. L. Rev. 637, 659, and n. 47 (1930) ("In no case, so far as the present examination of authorities has disclosed, has it been held that the taxpayer must resort to available modes of direct attack by *judicial* proceedings, before proceeding with collateral attack, except in injunction cases in which an injunction is refused because of the adequacy of the legal remedy").

[23] In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938), which set forth the exhaustion requirement with respect to federal administrative remedies, Justice Brandeis noted that the exhaustion rule had frequently been applied in equity cases. *Id.*, at 51, n. 9. "But," he added, "because the rule is one of judicial administration—not merely a rule governing the exercise of discretion—it is applicable to proceedings at law as well as suits in equity," *ibid.*, citing *Weld County*.

torically guided the federal equity courts and were later embodied in the Tax Injunction Act. Those principles, and *Weld County*, govern the treatment of actions at law involving state tax matters.

Petitioners seek to avoid the reach of *Weld County* by arguing that this case is to be controlled by the general rule stated in *McNeese* v. *Board of Education*, 373 U. S. 668 (1963), that in cases brought pursuant to 42 U. S. C. § 1983, resort to state administrative remedies is not a precondition to federal suit. As a factual matter of course, it is difficult to distinguish *Weld County*, which raised factual allegations that closely parallel those of the complaint at issue here.[24]

More importantly, while this Court has repeatedly reaffirmed that exhaustion of administrative remedies is not a precondition to a suit brought under the Civil Rights Acts,

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[24] Petitioners seek to distinguish this case from *Weld County*, arguing that in *Weld County* the action was brought against the county directly, and was thus in effect a suit for a refund for which exhaustion might be appropriate, while this action has been brought pursuant to 42 U. S. C. § 1983 against officials of the county, seeking damages. The distinction is unpersuasive. Any relief obtained by petitioners through the administrative process would, of course, reduce the potential damages liability of these defendants. Moreover, a city or county might itself be susceptible to suit under 42 U. S. C. § 1983 where (as is apparently the allegation here) it is alleged that the unlawful assessments are an artifact of official policy. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). Petitioners should not be able to circumvent the exhaustion requirement by designedly not bringing suit against the single potential defendant to have actually benefited from the collection of the allegedly unlawful tax.

Finally, petitioners' argument is particularly inapt in this case. Many of the officials named as defendants have no small involvement in the administrative process. It surely seems appropriate that before being held accountable in court those officials have the opportunity fully to consider petitioners' claims within the administrative forum that provides the only basis for their involvement in this matter. See *McKart* v. *United States*, 395 U. S., at 195.

Of course, it is unnecessary to decide whether the allegations in the complaint at issue here do state a claim under 42 U. S. C. § 1983.

see, *e. g.*, *Ellis* v. *Dyson*, 421 U. S. 426, 432–433 (1975); *Steffel* v. *Thompson*, 415 U. S. 452, 472–473 (1974); *Carter* v. *Stanton*, 405 U. S. 669, 670–671 (1972); *Wilwording* v. *Swenson*, 404 U. S. 249, 251 (1971) *(per curiam)*; *King* v. *Smith*, 392 U. S. 309, 312, n. 4 (1968); *Damico* v. *California*, 389 U. S. 416, 416–417 (1967) *(per curiam)*, that conclusion rests firmly on the understanding that such was the intention of Congress in enacting § 1983. Where Congress has provided that in a particular class of cases the federal courts should refrain from hearing suits brought under § 1983 until administrative remedies have been exhausted, see, *e. g.*, 42 U. S. C. § 1997e (1976 ed., Supp. IV), there is no doubt that the federal courts are bound by that limitation. Cf. *Preiser* v. *Rodriguez*, 411 U. S. 475, 489–490 (1973). My view has always been that displacement of § 1983 remedies can only "be justified by a clear statement of congressional intent, or, at the very least, by the presence of the most persuasive considerations of policy."[25] *Id.*, at 518 (BRENNAN, J., dissenting). Surely a somewhat lesser showing is required where, as here, we are concerned not with the displacement of the § 1983 remedy, but with the deferral of federal court consideration pending exhaustion of the state *administrative* process. Where the obligation to require exhaustion of administrative remedies may be fairly understood from congressional action, or is in accord with congressional policy, not only is § 1983 no bar, but the federal courts should be alert to further those policies.

We plainly have sufficient evidence of such congressional policy here. As noted above, in enacting the Tax Injunction Act, Congress sought to assure that the federal courts would remain open to suits for monetary relief in state tax cases "if

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[25] I dissented in *Preiser* because I saw insufficient justification there to warrant displacement of the § 1983 remedy in favor of a habeas corpus procedure involving exhaustion of state judicial remedies.

the requisite elements of Federal jurisdiction existed." H. R. Rep. No. 1503, 75th Cong., 1st Sess., 3 (1937).[26] In 1937 the requirement of exhaustion of state administrative remedies was certainly a mandatory precondition to suit, and in that sense a "jurisdictional prerequisite." Nevertheless, we need not reach the conclusion that Congress intended by enactment of the Tax Injunction Act to freeze the then-operative jurisdictional practice of the federal courts in order to recognize that the administrative-exhaustion requirement is entirely consonant with the principal purposes of the Act: to provide assurance that federal courts exercise at least the same restraint in dealing with questions of state tax administration as the courts of the State that levied the tax. Where administrative remedies are a precondition to suit for monetary relief in state court, absent some substantial consideration compelling a contrary result in a particular case, those remedies should be deemed a precondition to suit in federal court as well.[27]

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[26] See also H. R. Rep. No. 1503, at 4: "'[T]he aggrieved party is left to . . . his suit at law in the Federal courts if the essential elements of Federal jurisdiction are present'" (quoting *Matthews* v. *Rodgers*, 284 U. S. 521, 525–526 (1932)).

[27] In *Perez* v. *Ledesma*, 401 U. S. 82, 128, n. 17 (1971) (concurring in part and dissenting in part), I noted the policies that have motivated both judicial and congressional restraint in this field:

"The special reasons justifying the policy of federal noninterference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to

V

Petitioners sought damages arising from what they alleged to be unconstitutional assessments in four tax years. In 1974 and 1975, they failed to pursue in any manner the administrative remedies provided by the State. In 1977 they appealed their assessment to the St. Louis County Board of Equalization and gained substantial relief. Although they claim here that the relief granted by the Board of Equalization failed to bring their assessment up to constitutional standards, they failed to appeal the Board's ruling for that year to the State Tax Commission. An appeal of their 1978 assessment was pending before the State Tax Commission at the time they brought this action.

Because petitioners failed to exhaust their administrative remedies in each tax year for which they seek damages, their complaint was properly dismissed. To the extent today's judgment affirms that dismissal, I concur.

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turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts."

Thus I recognize, as does the Court, those considerations that have prompted federal restraint in matters of state taxation. My quarrel with the Court is that in my view those concerns can be, and historically have been, addressed by means far less drastic than the judicial abnegation of federal court jurisdiction. The administrative-exhaustion requirement squarely meets those concerns. Indeed, the problems perhaps least well met by the administrative-exhaustion requirement are adequately served by other established mechanisms of federal restraint: the possibility of an unwarranted financial burden on the taxing authority during the pendency of litigation is directly addressed by the Tax Injunction Act itself and our restriction on the use of the declaratory judgment procedure; the primacy of the state courts as expositors of state tax law prevails through application of principles of abstention as enunciated in *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941).

Syllabus

WEINBERGER, SECRETARY OF DEFENSE, ET AL. *v.* CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80–1377. Argued October 13, 1981—Decided December 1, 1981

Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) requires all federal agencies, "to the fullest extent possible," to include an Environmental Impact Statement (EIS) in proposals for major federal actions significantly affecting the environment, and also requires the EIS to be made available to the public, subject to the provisions of the Freedom of Information Act (FOIA). With respect to the construction in Hawaii of new ammunition and weapons storage facilities containing magazines capable of storing nuclear weapons, the Navy prepared an Environmental Impact Assessment, which concluded that the new facilities would have no significant environmental impact, and therefore no EIS was prepared. Because the information is classified for national security reasons, the Navy's regulations forbid it either to admit or to deny that nuclear weapons are actually stored at the now-completed facilities. Before construction of the facilities was completed, respondents brought an action in Federal District Court seeking an injunction against the building of the facilities until an EIS had been filed. The District Court held that, in view of, *inter alia*, the Navy's own regulations, the Navy had complied with NEPA "to the fullest extent possible" within the meaning of § 102(2)(C). The Court of Appeals reversed, holding that § 102(2)(C) requires the Navy to prepare and release to the public a "Hypothetical Environmental Impact Statement" with regard to a facility capable of storing nuclear weapons.

Held: The Court of Appeals erred in requiring the Navy to prepare and release to the public a "Hypothetical Environmental Impact Statement." Pp. 143–147.

(a) In inventing such a statement the Court of Appeals departed from Congress' express intent manifested by the explicit language in § 102(2)(C) providing that public disclosure of an EIS should be governed by the FOIA. Here, Exemption 1 of the FOIA, which exempts from disclosure classified material dealing with national security, such as information relating to the storage of nuclear weapons, is applicable. Pp. 143–145.

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(b) Moreover, by requiring such a statement, the Court of Appeals required the production of a document that would not exist save for what that court thought to be NEPA's disclosure requirements. If the Navy would not be required by the FOIA to release an EIS were one already prepared, it is obviously not required to prepare a "hypothetical" EIS nowhere mentioned in NEPA. P. 145.

(c) The Navy is not required to prepare an EIS simply because the facilities in question are "nuclear capable," but rather it is the proposal to *store* nuclear weapons at those facilities that would trigger the obligation to prepare an EIS. Here, it has not been and cannot be established whether the Navy had made such a proposal. P. 146.

643 F. 2d 569, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, in which BRENNAN, J., joined, *post*, p. 147.

Solicitor General Lee argued the cause for petitioners. With him on the briefs were former *Solicitor General McCree*, *Assistant Attorney General Dinkins*, *Deputy Solicitor General Claiborne*, *Harlon L. Dalton*, *Peter R. Steenland, Jr.*, *Raymond N. Zagone*, and *Martin Green*.

Nancy Stearns argued the cause for respondents. With her on the brief was *Robert L. Boehm*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

The Court of Appeals for the Ninth Circuit held that § 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 853, 42 U. S. C. § 4332(2)(C), requires the Navy to prepare and release to the public a "Hypothetical Environmental Impact Statement" with regard to the opera-

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**Ronald A. Zambrun* and *Raymond M. Momboisse* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal.

Ronald J. Wilson filed a brief for the National Resources Defense Council, Inc., et al. as *amici curiae* urging affirmance.

Doron Weinberg filed a brief for the Fellowship of Reconciliation et al. as *amici curiae*.

tion of a facility capable of storing nuclear weapons. *Catholic Action of Hawaii/Peace Education Project* v. *Brown*, 643 F. 2d 569, 572 (1980). Because we conclude that the "Hypothetical Environmental Impact Statement" is a creature of judicial cloth, not legislative cloth, and that it is not mandated by any of the statutory or regulatory provisions upon which the Court of Appeals relied, we reverse its decision.

The facts relevant to our decision are not seriously controverted. Pursuant to a decision by the Navy to transfer ammunition and weapons stored at various locations on the island of Oahu, Hawaii, to the West Loch branch of the Lualualei Naval Magazine, the Navy prepared an Environmental Impact Assessment[1] (EIA) concerning how the plan would affect the environment. The assessment concluded that the necessary construction of 48 earth-covered magazines and associated structures would have no significant environmental impact, and therefore no Environmental Impact Statement (EIS) was prepared at the construction stage. Construction contracts were let in March 1977 and in April 1978. Construction of the West Loch facilities has been completed and the magazines are now in use. It is stipulated that the magazines are capable of storing nuclear weapons. Because the information is classified for national security reasons, the Navy's regulations forbid it either to admit or to deny that nuclear weapons are actually stored at West Loch.[2]

In 1978, the Navy prepared a Candidate Environmental Impact Statement (CEIS). This CEIS deals generally with the environmental hazards associated with the storage, han-

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[1] An Environmental Impact Assessment is a document prepared by a federal agency in order to determine whether a formal Environmental Impact Statement should be prepared. See 40 CFR § 1508.9 (1981).

[2] Navy Security Classification Guide for Nuclear Weapons, Navy SWOP 55–1 (1974); Dept. of Navy, OPNAV Instruction 5721.1C (1975).

dling, and transporation of nuclear weapons, but does not refer to any specific site or storage facility. It concludes that no significant hazards to the environment are present.

In March 1978, respondents brought this action seeking an injunction against the building of the new facilities at West Loch until an EIS had been filed. Their principal complaint was that the Navy's EIA had ignored the enhanced risk of a nuclear accident resulting from West Loch's proximity to three nearby air facilities, the effects of such an accident on the population and environment of Hawaii, and the effects of radiation from the storage of nuclear weapons in a populated area. The United States District Court for the District of Hawaii concluded that the "construction and use of the storage facilities at West Loch is a major federal action" within the meaning of § 102(2)(C). 468 F. Supp. 190, 193 (1979). But given certain national security provisions of the Atomic Energy Act, 42 U. S. C. § 2011 *et seq.* (1976 ed. and Supp. IV), and the Navy's own regulations concerning nuclear weapons, the District Court concluded that petitioners had complied with NEPA "to the fullest extent possible." 468 F. Supp., at 193. We find it unnecessary to reach the question posed by the District Court's reliance on the security provisions of the Atomic Energy Act,[3] since respondents have made no showing in this case that the Navy has failed to comply, or even need comply, with NEPA's requirements regarding the preparation and public disclosure of an EIS.

Section 102(2)(C) of NEPA, 42 U. S. C. § 4332(2)(C), provides that, "to the fullest extent possible," all federal agencies shall "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement" discussing, *inter alia*, the environmental impact of the proposed action and possible alternatives. Section 102(2)(C) also requires that the EIS be made available to the President, the Council on Environmental Quality

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[3] 42 U. S. C. §§ 2014(y), 2161, 2162, 2271.

(CEQ), and the public, subject to the provisions of the Freedom of Information Act (FOIA), 5 U. S. C. § 552 (1976 ed. and Supp. V).

We have previously noted: "The thrust of § 102(2)(C) is . . . that environmental concerns be integrated into the very process of agency decisionmaking. The 'detailed statement' it requires is the outward sign that environmental values and consequences have been considered during the planning stage of agency actions." *Andrus* v. *Sierra Club*, 442 U. S. 347, 350 (1979). Section 102(2)(C) thus serves twin aims. The first is to inject environmental considerations into the federal agency's decisionmaking process by requiring the agency to prepare an EIS. The second aim is to inform the public that the agency has considered environmental concerns in its decisionmaking process. Through the disclosure of an EIS, the public is made aware that the agency has taken environmental considerations into account. Public disclosure of the EIS is expressly governed by FOIA. 42 U. S. C. § 4332(2)(C).

The decisionmaking and public disclosure goals of § 102 (2)(C), though certainly compatible, are not necessarily coextensive. Thus, § 102(2)(C) contemplates that in a given situation a federal agency might have to include environmental considerations in its decisionmaking process, yet withhold public disclosure of any NEPA documents, in whole or in part, under the authority of an FOIA exemption. That the decisionmaking and disclosure requirements of NEPA are not coextensive has been recognized by the Department of Defense's regulations, both at the time the West Loch facility was constructed[4] and today.[5]

In an apparent attempt to balance what it considered to be the disclosure requirements of NEPA with national security interests, the Court of Appeals concluded that petitioners could prepare and disclose an EIS that would assess the im-

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[4] 32 CFR § 214.8 (1978) (repealed).

[5] 32 CFR § 214.6 (1980).

pact of the storage of nuclear weapons at West Loch without revealing specific information regarding the number and type of nuclear weapons to be stored at the facility. 643 F. 2d, at 572. The EIS could hypothesize, but not concede, that the facility will be used for the purpose for which it has been made capable. *Ibid.* But in inventing the "Hypothetical Environmental Impact Statement," the Court of Appeals departed from the express intent of Congress manifested by the explicit language in § 102(2)(C). That language provides that public disclosure of the EIS shall be governed by FOIA. As we concluded in *EPA* v. *Mink*, 410 U. S. 73, 80 (1973), FOIA was intended by Congress to balance the public's need for access to official information with the Government's need for confidentiality. Of the nine exemptions in Subsection (b) of FOIA, we think two are relevant in determining whether the Navy must release an EIS. Exemption 3, 5 U. S. C. § 552(b)(3), which authorizes the withholding of documents "specifically exempted from disclosure by statute," arguably exempts the publication of an EIS under the Atomic Energy Act. But we find it unnecessary to decide this question, because to us it is clear that Exemption 1, 5 U. S. C. § 552(b)(1), is applicable.

Exemption 1 exempts from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." Executive Order No. 12065, 3 CFR 190 (1978–1979 Comp.), confers upon specified officials the power to classify information if its release would pose a threat to national security. Virtually all information relating to the storage of nuclear weapons is classified. Thus, any material properly classified pursuant to Executive Order No. 12065[6] is exempt from disclosure under

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[6] Executive Order No. 12065 superseded Executive Order No. 11652, 3 CFR 678 (1971–1975 Comp.), which in turn superseded Executive Order

Exemption 1, and therefore is exempt from the public disclosure requirements of NEPA.

Congress has thus effected a balance between the needs of the public for access to documents prepared by a federal agency and the necessity of nondisclosure or secrecy. The Court of Appeals in this case should have accepted the balance struck by Congress, rather than engrafting onto the statutory language unique concepts of its own making. By requiring the Navy to prepare a "hypothetical" EIS, the Court of Appeals required the production of a document that would not exist save for what that court thought to be NEPA's public disclosure requirements. But NEPA's public disclosure requirements are expressly governed by FOIA. In *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 161–162 (1975), we held that FOIA "does not compel agencies to write opinions in cases in which they would not otherwise be required to do so. It only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create." See *Forsham* v. *Harris*, 445 U. S. 169, 185–186 (1980); *Kissinger* v. *Reporters Committee*, 445 U. S. 136, 152 (1980). It follows that if the Navy would not be required by FOIA to release an EIS were one already prepared, it is obviously not required to prepare a "hypothetical" EIS nowhere mentioned in NEPA.

Since the public disclosure requirements of NEPA are governed by FOIA, it is clear that Congress intended that the public's interest in ensuring that federal agencies comply with NEPA must give way to the Government's need to preserve military secrets. In the instant case, an EIS concerning a proposal to store nuclear weapons at West Loch need not be disclosed. As we indicated earlier, whether or not

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No. 10501, 3 CFR 979 (1949–1953 Comp.). Our decision in *EPA* v. *Mink*, 410 U. S. 73 (1973), rested on an application of Executive Order No. 10501. 410 U. S., at 81, and n. 7, 84, and n. 9.

nuclear weapons are stored at West Loch is classified information exempt from disclosure to the public under Exemption 1.

If the Navy proposes to store nuclear weapons at West Loch, the Department of Defense's regulations[7] can fairly be read to require that an EIS be prepared solely for internal purposes, even though such a document cannot be disclosed to the public. The Navy must consider environmental consequences in its decisionmaking process, even if it is unable to meet NEPA's public disclosure goals by virtue of FOIA Exemption 1.

It does not follow, however, that the Navy is required to prepare an EIS in this case. The Navy is not required to prepare an EIS regarding the hazards of storing nuclear weapons at West Loch simply because the facility is "nuclear capable." As we held in *Kleppe* v. *Sierra Club*, 427 U. S. 390, 405–406 (1976), an EIS need not be prepared simply because a project is *contemplated*, but only when the project is *proposed*. To say that the West Loch facility is "nuclear capable" is to say little more than that the Navy has contemplated the possibility that nuclear weapons, of whatever variety, may at some time be stored here. It is the proposal to *store* nuclear weapons at West Loch that triggers the Navy's obligation to prepare an EIS. Due to national security reasons, however, the Navy can neither admit nor deny that it proposes to store nuclear weapons at West Loch. In this case, therefore, it has not been and cannot be established that the Navy has proposed the only action that would require the preparation of an EIS dealing with the environmental consequences of nuclear weapons storage at West Loch.

Ultimately, whether or not the Navy has complied with NEPA "to the fullest extent possible" is beyond judicial scrutiny in this case. In other circumstances, we have held that "public policy forbids the maintenance of any suit in a court of

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[7] See 32 CFR § 214.8 (1978) (repealed); 32 CFR § 214.6 (1980).

justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Totten* v. *United States*, 92 U. S. 105, 107 (1876). See *United States* v. *Reynolds*, 345 U. S. 1 (1953). We confront a similar situation in the instant case.

The decision of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded with instructions to reinstate the judgment of dismissal entered by the District Court.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, concurring in the judgment.

The law to be applied in this case is relatively simple and straightforward. If the Navy proposes to engage in a major action that will have a significant environmental effect, it must prepare an environmental impact statement (EIS) addressing the consequences of the proposed activity. If disclosing the contents, or even the existence, of the EIS will reveal properly classified materials, the Navy need not publish the document. If nonclassified data is segregable and properly disclosable under Executive Order No. 12065, it must be released to the public. I write separately because I believe that the Court understates the first and third of these points, and overstates the second.

The Court states rather obliquely that if the Navy proposes to store nuclear weapons, "the Department of Defense regulations can fairly be read to require that an EIS be prepared solely for internal [Navy] purposes." *Ante*, at 146 (footnote omitted). In fact, the Defense Department regulations explicitly declare that "[t]he fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with the NEPA," although in such a circumstance the required EIS "shall be prepared, safeguarded and disseminated in accordance with the require-

ments applicable to classified information." 46 Fed. Reg. 22892, 22894 (1981) (to be codified in 32 CFR § 775.5). In this, the Defense regulations simply echo the statutory language: NEPA flatly requires that, "to the fullest extent possible," all federal agencies "include in *every* recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed [environmental impact] statement." 42 U. S. C. § 4332(C) (emphasis added). No exception is made for a confidential or classified proposal. Similarly, regulations promulgated by the Council on Environmental Quality provide simply that "environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination," 40 CFR § 1507.3(c) (1981); the regulations do not—and could not, consistently with the statute—suggest that classified proposals are exempt from NEPA's EIS requirement.

It seems to me that this follows necessarily from the function of the EIS. One of its purposes—if not its principal purpose—is to guarantee that "environmental concerns are . . . interwoven into the fabric of agency planning." *Andrus* v. *Sierra Club*, 442 U. S. 347, 351 (1979). The CEQ has recognized:

> "The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government. . . . An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions." 40 CFR § 1502.1 (1981).

This is no less true when the public is unaware of the agency's proposals. Indeed, the public's inability to participate in military decisionmaking makes it particularly important that,

in cases such as the one before us, the EIS "serve practically as an important contribution to the decisionmaking process." § 1502.5.

The Court obviously is quite correct in holding that properly classified materials need not be disclosed under NEPA; even information concerning the existence of an EIS may be withheld when publication would divulge sensitive military information. It remains true, however, that the statute is in part intended to inform the public, see *ante*, at 143, and this informational purpose does not entirely lose its vitality when classified documents are involved. Again, the Defense regulations specifically direct that "[w]hen feasible, [EIS's] shall be organized in such a manner that classified portions are included as annexes so that the unclassified portions can be made available to the public," 46 Fed. Reg. 22892, 22894 (1981); further, the CEQ agrees that EIS's may be organized in such a way "that the unclassified portions can be made available to the public," 40 CFR § 1507.3(c) (1981). In a given case, then, the military must determine whether the information at issue, consistent with the dictates of the relevant Executive Orders, can be released. That principle is applicable in this and in every other case involving classified military material; I must assume that the Court does not hold differently.

It seems to me that the Court need not go beyond these relatively straightforward principles. FOIA's first exemption, 5 U. S. C. § 552(b)(1), defeats respondents' attempt to obtain classified material; it therefore is unnecessary to address the applicability or vitality of *Totten* v. *United States*, 92 U. S. 105 (1876), which suggested as a matter of "public policy" that certain suits involving confidential data could not be maintained. *Id.*, at 107. Similarly, it is unnecessary to address the applicability of *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132 (1975), to this case.* Petitioners convinc-

*The Court properly notes that *Sears* held that the FOIA "'does not compel agencies to write opinions in cases in which they would not other-

ingly argued that publishing a hypothetical EIS would itself disclose confidential material, and would therefore run afoul of the FOIA's first exemption. And, in any event, as the Court properly notes, *ante*, at 146, the respondents have yet to establish that any EIS need be prepared for the West Loch project. That is enough to dispose of the question of a hypothetical EIS.

Accordingly, I concur in the judgment of the Court.

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wise be required to do so.'" *Ante*, at 145, quoting 421 U. S., at 161–162. The Court goes on to suggest that the Court of Appeals' analysis runs afoul of *Sears*, because that court "required [the Navy] to prepare a 'hypothetical' EIS nowhere mentioned in NEPA." *Ante*, at 145. But the Court of Appeals did not explicitly require the preparation of a series of hypothetical documents; instead, it stated that "factual information . . . [used in the EIS] *can* be based on a series of hypotheses," *Catholic Action of Hawaii/Peace Education Project* v. *Brown*, 643 F. 2d 569, 572 (CA9 1980) (emphasis added), thus authorizing the Navy to prepare advisory studies as a "smokescreen" if it wished to do so.

This does not raise quite the same issue as that involved in *Sears*. There, the Court held that a plaintiff could not compel the preparation of a document in order to obtain information not yet reduced to documentary form; here, respondents are trying to obtain data which they presume are contained in an existing study, with the Court of Appeals suggesting the production of new documents for the independent purpose of protecting national security. And there is, as well, another distinction between the cases: while it makes use of FOIA's disclosure provisions, NEPA is in essence an "action-forcing" statute. FOIA itself, however, is not.

It could be argued that the Court of Appeals' analysis violates the holding of *Kleppe* v. *Sierra Club*, 427 U. S. 390, 405–406 (1976), where this Court concluded that an EIS need be prepared only when a project is actually proposed; in seeming contradiction of that holding, the Court of Appeals stated that an EIS must be developed "[i]f nuclear storage is a *potential* choice." 643 F. 2d, at 571 (emphasis added). But it is less clear to me that the strictures of *Sears* are relevant here, and I would not reach the question.

Syllabus

WATT, SECRETARY OF THE INTERIOR, ET AL. *v.* ENERGY ACTION EDUCATIONAL FOUNDATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80–1464. Argued October 5, 1981—Decided December 1, 1981

Under the Outer Continental Shelf Lands Act of 1953 (Act), the Secretary of the Interior (Secretary) is authorized to lease tracts of the Outer Continental Shelf (OCS) for the exploration for, and development of, mineral resources, including oil and gas. As originally passed, the Act authorized the Secretary, in his discretion, to solicit bids either by fixing a royalty rate of not less than 12½%, and requiring bids on an initial "cash bonus" to be paid when the lease was awarded, or by fixing the amount of the cash bonus, and requiring bids on the royalty rate. In practice, virtually all tracts were leased on the basis of a fixed royalty, with bidding on the amount of the cash bonus. However, the Outer Continental Shelf Lands Act Amendments of 1978 (1978 Amendments) increased the number of authorized bidding systems to 10, retaining the original system and authorizing new systems, some of which also involve cash bonus bidding, while others use a factor other than the cash bonus as the bidding variable. The 1978 Amendments direct the Secretary to develop a 5-year plan of experimentation with the new systems, requiring him to experiment with the bidding systems other than the traditional cash bonus, fixed royalty system in not less than 20% but not more than 60% of the total area offered for leasing each year, unless he determines that those percentage requirements are inconsistent with the 1978 Amendments' purposes. The 1978 Amendments assure ongoing congressional oversight of the Secretary's leasing activities by requiring frequent reports to Congress. To date, the Secretary has used two of the nontraditional bidding systems in leases covering 49% of the total area offered. However, he has not experimented with any of the systems using a factor other than the size of a cash bonus as the bidding variable. Respondents, including the State of California, brought suit for declaratory and injunctive relief, alleging, *inter alia*, that the Secretary has abused his discretion by failing to experiment with systems that do not use the size of a cash bonus as the bidding variable. The District Court denied both parties' motions for summary judgment, but the Court of Appeals held, *inter alia*, that the 1978 Amendments require the Secretary to ex-

periment with at least some of the bidding systems that do not use the size of a cash bonus as the bidding variable.

Held:

1. California has standing to challenge the Secretary's choice of bidding systems. Because the 1978 Amendments require the Federal Government to turn over a fair share of the revenues of an OCS lease to the neighboring coastal State whenever the Federal Government and the State own adjoining portions of an OCS oil and gas pool, California has a direct financial stake in federal OCS leasing off the California coast. In alleging that the bidding systems currently used by the Secretary are incapable of producing a fair market return, California asserts the kind of "distinct and palpable injury" that is required for standing. And California also satisfies the requirement that there be a "fairly traceable" causal connection between the injury it claims and the conduct it challenges, so that if the relief sought is granted, the injury will be redressed. Pp. 160–162.

2. The Court of Appeals erred in compelling the Secretary to experiment with non-cash-bonus bidding systems. Pp. 162–169.

(a) Nothing in the 1978 Amendments suggests that Congress, in committing the Government to the goal of obtaining fair market value for OCS oil and gas resources, intended to channel the Secretary's discretion in choosing among the alternative bidding systems, and nothing in the statute singles out the non-cash-bonus systems for special consideration. The language of the 1978 Amendments requires experimentation with at least some of the new bidding systems, but leaves the details to the Secretary's discretion. Pp. 162–165.

(b) Nor does the legislative history of the 1978 Amendments compel the conclusion that the Congress as a whole intended to limit the Secretary's discretion to choose among the various experimental bidding systems. When viewed in context, unfavorable references to "cash bonus" bidding show congressional dissatisfaction with large front-end payments associated with the traditional cash bonus bid, fixed royalty system then in effect, not with all forms of cash bonus bidding. Pp. 165–168.

210 U. S. App. D. C. 20, 654 F. 2d 735, reversed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Claiborne argued the cause for petitioners. With him on the briefs were *Solicitor General Lee*, former *Solicitor General McCree*, *Assistant Attorney*

General Dinkins, Harriet S. Shaprio, Anne S. Almy, Edward J. Schawaker, and *Bruce C. Rashkow.*

John Silard argued the cause for respondents. With him on the brief was *Joseph L. Rauh, Jr.**

JUSTICE O'CONNOR delivered the opinion of the Court.

We are asked to review a decision of the United States Court of Appeals for the District of Columbia Circuit compelling the Secretary of the Interior to experiment with the use of certain statutorily defined bidding systems in awarding leases for oil and gas exploration and development on the Outer Continental Shelf. Because the decision below incorrectly construes the Outer Continental Shelf Lands Act Amendments of 1978, 92 Stat. 629, 43 U. S. C. § 1331 *et seq.* (1976 ed. and Supp. III), we reverse.

I

The Outer Continental Shelf Lands Act of 1953 (OCS Lands Act), 67 Stat. 462, as amended, 92 Stat. 629, 43 U. S. C. § 1331 *et seq.* (1976 ed. and Supp. III), authorizes the Secretary of the Interior to lease tracts of the Outer Continental Shelf (OCS)[1] for the exploration and development of mineral resources, including oil and gas. As originally passed, the OCS Lands Act authorized the Secretary to solicit sealed bids either by fixing a royalty rate of not less than 12½%, and requiring bids on the amount of an initial "cash bonus" to be paid at the time the lease was awarded, or by

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**E. Edward Bruce* filed a brief for Atlantic Richfield Co. et al. as *amici curiae* urging reversal.

[1]The Outer Continental Shelf is defined by statute to mean "all submerged lands lying seaward and outside of the area of lands beneath navigable waters . . . and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U. S. C. § 1331(a). The term "lands beneath navigable waters" is itself given an extensive definition in 43 U. S. C. § 1301, but generally means the undersea lands within three miles of the coastline.

fixing the amount of the cash bonus, and requiring bids on the royalty rate. 43 U. S. C. § 1337(a). The OCS Lands Act vested complete discretion in the Secretary to choose between these two bidding systems. In practice, prior to 1978 virtually all tracts were leased on the basis of a fixed royalty of 16⅔% of the gross value of production, with bidding on the amount of the cash bonus. See H. R. Rep. No. 95–590, p. 138 (1977); S. Rep. No. 95–284, p. 72 (1977).

During the mid-1970's, the Nation's increasing dependence on imported oil focused public attention on the OCS as a potential source of domestic petroleum and natural gas. See H. R. Rep. No. 95–590, *supra*, at 53–54. At the same time, the traditional OCS bidding procedures came under close scrutiny because dramatic increases in petroleum prices made existing cash bonuses seem miserly relative to the revenues generated from wells on OCS leaseholds. Members of Congress began to express reservations about the ability of the traditional cash bonus, fixed royalty system to assure a fair return to the Government, principally because it appeared that only the major oil companies could risk paying a large cash bonus to lease a tract of unknown value. Because the number of bidders was often limited to a handful of giant concerns, competition for the leases seemed tepid, and there was no assurance that the ultimate return to the Government was adequate. See, *e. g.*, *id.*, at 47, 54.

Responding to these and other pressures for modernization of the OCS Lands Act, Congress passed the Outer Continental Shelf Lands Act Amendments of 1978 (1978 Amendments), Pub. L. 95–372, 92 Stat. 629.[2] Through the 1978 Amendments, Congress sought to experiment with alternatives to the traditional bidding system. To this end, it in-

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[2] The "basic purpose" of the 1978 Amendments was to "promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf," H. R. Rep. No. 95–590, p. 53 (1977), and the Amendments were broadly designed to achieve that aim. We are concerned here, however, only with those provisions of the 1978 Amendments having to do with bidding systems for OCS leases.

creased the number of authorized bidding systems from 2 to 10, 43 U. S. C. § 1337(a)(1) (1976 ed., Supp. III), and directed the Secretary of the Interior to develop a 5-year plan of experimentation with the new systems. §§ 1337(a)(5)(B), 1344. Four of the newly authorized systems use a cash bonus bid (including the cash bonus, fixed royalty system, which was specifically retained in § 1337(a)(1)(A)),[3] three use a royalty rate bid,[4] one uses a "profit-share" bid,[5] and two use a "work-commitment" bid.[6]

Although the 1978 Amendments, like the original OCS

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[3] Title 43 U. S. C. § 1337(a)(1) (1976 ed., Supp. III) authorizes: (1) a "cash bonus bid with a royalty at not less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold," § 1337(a)(1)(A); (2) a "cash bonus bid . . . and a diminishing or sliding royalty based on such formulae as the Secretary shall determine as equitable to encourage continued production from the lease area as resources diminish, but not less than 12½ per centum at the beginning of the lease period in amount or value of the production saved, removed, or sold," § 1337(a)(1)(C); (3) a "cash bonus bid with a fixed share of the net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area," § 1337(a)(1)(D); and (4) a "cash bonus bid with a royalty at no less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold and a fixed per centum share of net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area," § 1337(a)(1)(F).

[4] Section 1337(a)(1)(B) authorizes: a "variable royalty bid based on a per centum in amount or value of the production saved, removed, or sold, with either [1] a fixed work commitment based on dollar amount for exploration or [2] a fixed cash bonus as determined by the Secretary, or [3] both."

[5] Section 1337(a)(1)(E) authorizes a "fixed cash bonus with the net profit share reserved as the bid variable."

[6] Section 1337(a)(1) authorizes: (1) a "work commitment bid based on a dollar amount for exploration with a fixed cash bonus, and a diminishing or sliding scale royalty based on such formulae as the Secretary shall determine as equitable to encourage continued production from the lease area as resources diminish, but not less than 12½ per centum at the beginning of the lease period in amount or value of the production saved, removed, or sold," § 1337(a)(1)(C); and (2) a "work commitment bid based on a dollar amount for exploration with a fixed cash bonus and a fixed royalty in amount or value of the production saved, removed, or sold," § 1337(a)(1)(G).

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Lands Act, give the Secretary of the Interior the discretion to select among the various authorized bidding systems, that discretion is no longer total. The statute now requires the Secretary to experiment with the nine nontraditional systems in "not less than 20 per centum and not more than 60 per centum of the total area offered for leasing each year," § 1337(a)(5)(B), unless he determines that those percentage requirements are "inconsistent with the purposes and policies" of the 1978 Amendments.[7]

The 1978 Amendments assure ongoing congressional oversight of the Secretary of the Interior's leasing activities by requiring frequent reports to Congress on the operation of the bidding systems. For example, the Secretary of Energy, who has responsibility for issuing regulations governing OCS bidding,[8] must report within six months of the end of each fiscal year "with respect to the use of [the] various bidding options," including, "if applicable, the reasons why a particular bidding system has not been or will not be utilized." § 1337(a)(9). In addition, the Secretary of the Interior must submit each fiscal year a report that includes "an evaluation of the competitive bidding systems permitted under [the 1978 Amendments], and, if applicable, the reasons why a particular bidding system has not been utilized," as well as "an evaluation of alternative bidding systems not per-

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[7] Section 1337(a)(9)(E) requires that his determination be explained to Congress.

[8] Under the 1978 Amendments, the Secretaries of the Interior and of Energy work together on the OCS leasing program. Competitive bidding for OCS leases is to be carried out pursuant to "regulations promulgated in advance," § 1337(a)(1), and the Department of Energy Organization Act, 42 U. S. C. §§ 7152(b), 7153 (1976 ed., Supp. III), gives the Secretary of Energy the responsibility for issuing such regulations in consultation with the Secretary of the Interior. The Secretary of Energy also has authority to develop bidding systems other than the 10 specifically enumerated in § 1337(a)(1), provided any new system has no more than one bidding variable and is not disapproved by Congress. §§ 1337(a)(1)(H), (a)(4)(A).

mitted under [the 1978 Amendments], and why such system or systems should or should not be utilized." §§ 1343(2)(A) and (B).

To date, the Secretary of Energy has issued regulations for a number of the bidding systems, including three of the four systems using cash bonus bidding, 10 CFR §§ 375, 376 (1981) (the cash bonus bid, fixed royalty system and the cash bonus bid, fixed sliding-scale royalty system); §§ 376, 390 (the cash bonus bid, fixed net profit-share system), as well as the royalty bid, fixed cash bonus system, §§ 375, 376, the net profit-share bid, fixed cash bonus system, §§ 376, 390, and the work-commitment bid, fixed cash bonus and fixed royalty system, 46 Fed. Reg. 35614 (1981) (to be codified in 10 CFR §§ 376, 390). For his part, the Secretary of the Interior has prepared a 5-year program for the period from June 1980 to May 1985, calling for 36 sales, each involving a number of tracts. Brief for Petitioners 7. The Secretary of the Interior has so far used the nontraditional bidding systems in leases covering 49% of the total area offered, but has experimented with only two of the nine authorized alternative bidding systems: the cash bonus bid, fixed profit-share system, and the cash bonus bid, fixed sliding-scale royalty system. *Id.*, at 8, and n. 12. The Secretary of the Interior has not experimented, however, with *any* of the systems using a factor other than the size of a cash bonus as the bidding variable.[9]

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[9] During the course of the present litigation, the Secretary of the Interior filed an affidavit with the District Court stating that he does not intend to use either profit-share or work-commitment bidding because he does "not believe the purposes of the OCS Lands Act or the best interests of the nation would be served by the use" of either system. Affidavit of James G. Watt, Secretary of the Interior, *Energy Action Educational Foundation* v. *Watt*, No. 79–1633 (DC) (sworn May 8, 1981), reprinted in App. to Brief for Respondents 2a–3a. The Department of the Interior is on record as disfavoring royalty-share bidding as well. See *Energy Action Educational Foundation* v. *Andrus*, 210 U. S. App. D. C. 20, 28, and n. 44, 654 F. 2d 735, 743, and n. 44 (1980).

[Footnote 9 is continued on p. 158]

II

This litigation grows out of the Secretary of the Interior's continued reliance on cash bonus bidding systems. The respondents here, nine consumer groups, two state governmental entities, and three private citizens, brought suit against the United States, the Secretary of the Interior and the Secretary of Energy, alleging that the Secretaries had abused their discretion by failing to experiment with bidding systems that do not use the size of a cash bonus as the bidding variable. In essence, they complained that bonus bidding cannot generate adequate competition to yield a fair market return for OCS oil and gas as required by the 1978 Amendments. They sought declaratory and injunctive relief prohibiting further lease sales until the Secretary of Energy promulgated regulations for each of the alternative bidding systems, and prohibiting the further use of the cash bonus, low royalty bidding systems.

As reported to Congress, the bidding systems used during fiscal years 1978 through 1980 were as follows. In fiscal year 1978, three lease sales were held, with 218 tracts leased. Of those, 30 tracts were leased under the fixed cash bonus, royalty bid system, 41 under the cash bonus bid, sliding-scale royalty system, and the remainder under the traditional cash bonus bid, fixed 16⅔% royalty system. Department of the Interior, OCS Oil and Gas Leasing: An Annual Report on the Leasing and Production Program, Fiscal Year 1978. In fiscal year 1979, five lease sales were held, with 290 tracts leased. Of those, 161 were leased under the traditional cash bonus bid, 16⅔% royalty system, and 129 under the cash bonus bid, sliding-scale royalty system. Department of the Interior, OCS Oil and Gas Leasing: An Annual Report on the Leasing and Production Program, Fiscal Year 1979. In fiscal year 1980, four lease sales were held, with 293 tracts leased. Of those, 136 tracts were leased under the traditional cash bonus bid, 16⅔% royalty system, 120 under the cash bonus bid, sliding-scale royalty system, 23 under the cash bonus bid, fixed net profit-share system, and 14 under a cash bonus bid, fixed 33⅓% royalty system. Department of the Interior, Outer Continental Shelf Oil and Gas Leasing and Production Program, Annual Report, Fiscal Year 1980.

Three days after they filed suit and four days before a planned lease sale, the respondents filed a motion for a preliminary injunction barring all further lease sales until regulations had been promulgated for each of the bidding options contained in the 1978 Amendments. The District Court denied the motion because the respondents had not shown a likelihood of prevailing on the merits, and because the pace at which the Secretary of Energy was issuing regulations was not unlawfully slow in light of the complexity involved in preparing such regulations.[10] The Court of Appeals affirmed the District Court's ruling and remanded the case for further proceedings. *Energy Action Educational Foundation* v. *Andrus*, 203 U. S. App. D. C. 169, 631 F. 2d 751 (1979).

On remand, both parties moved for summary judgment, and the respondents renewed their motion for a preliminary injunction barring future lease sales until additional bidding system regulations had been issued. The District Court denied all motions for summary judgment as well as the respondents' motion for a preliminary injunction, 516 F. Supp. 90 (DC 1980), and the respondents once more appealed.

This time, the Court of Appeals affirmed the District Court only to the extent that it refused to enjoin lease sales scheduled for September, October, and November 1980. Turning to the underlying dispute, the court concluded both that the 1978 Amendments require the Secretary of the Interior to experiment with at least some of the bidding systems that do not use the size of a cash bonus as the bidding variable, and that the Secretary of Energy must issue appropriate regulations for the alternative bidding systems.[11] *Energy Action*

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[10] 479 F. Supp. 62 (DC 1979).

[11] On remand to the District Court, the parties stipulated to the entry of an order requiring the Department of Energy to issue final regulations for the net profit-share bid, fixed cash bonus system and the work-commitment bid, fixed cash bonus and fixed royalty system. Brief for Petitioners 9; Brief for Respondents 5, n. 1; see also 46 Fed. Reg. 35614, 35615 (1981) (to be codified in 10 CFR §§ 376, 390). Thus, no question is now presented

Educational Foundation v. *Andrus*, 210 U. S. App. D. C. 20, 654 F. 2d 735 (1980).

We granted the Government's petition for certiorari to review this construction of the 1978 Amendments. 450 U. S. 1040.

III

Before examining the merits, we must consider the petitioners' contention that the respondents do not have standing to challenge the Secretary of the Interior's choice of bidding systems.

There are three groups of plaintiffs in this litigation: (1) the State of California, which claims standing as an involuntary "partner" with the Federal Government in the leasing of OCS tracts in which the underlying pool of gas and oil lies under both the OCS and the 3-mile coastal belt controlled by California; (2) California and the city of Long Beach, which compete with the Federal Government in the leasing of off-shore oil and gas properties; and (3) consumers of oil and gas and of oil- and gas-derived products.[12] Because we find California has standing, we do not consider the standing of the other plaintiffs. See *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264, and n. 9 (1977); *Buckley* v. *Valeo*, 424 U. S. 1, 12 (1976) *(per curiam)*.

The 1978 Amendments require the Federal Government to turn over a fair share of the revenues of an OCS lease to the neighboring coastal State whenever the Federal Government and the State own adjoining portions of an OCS oil and gas

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concerning the Secretary of Energy's duty to issue these regulations. The Court of Appeals and the respondents based their conclusion that the Secretary of Energy must issue regulations for the alternative systems on the theory that the Secretary of the Interior must use them, the issue under consideration here.

[12] In their initial complaint, the individual respondents also claimed standing as taxpayers, but have not pressed that claim here. The 1978 Amendments contain a provision which permits suit by those having "a valid legal interest." § 1349(a)(1).

pool. See 43 U. S. C. § 1337(g)(4) (1976 ed., Supp. III). California thus has a direct financial stake in federal OCS leasing off the California coast. In alleging that the bidding systems currently used by the Secretary of the Interior are incapable of producing a fair market return, California clearly asserts the kind of "distinct and palpable injury," *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975), that is required for standing.

To demonstrate that it has standing, however, California must also show that there is a "fairly traceable" causal connection between the injury it claims and the conduct it challenges, *Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, at 261, so that if the relief sought is granted, the injury will be redressed, *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U. S. 26, 41–46 (1976). The petitioners argue that the relief California seeks—experimental use on some OCS lease tracts of non-cash-bonus bidding systems—will not ensure that the Secretary will try these systems on parcels leased off the California coast. According to the petitioners, even if California were to win its suit, cash bonus systems might nevertheless still be used to lease tracts overlying California's pools. The petitioners assert that California therefore lacks standing because it has failed to show that the relief requested would cause the Secretary of the Interior to use non-cash-bonus bidding systems on California's parcels.

The essence of California's complaint, however, is that the Secretary of the Interior, by failing to test non-cash-bonus systems, has breached a statutory obligation to determine through experiment which bidding system works best. According to California, only by testing non-cash-bonus systems can the Secretary of the Interior carry out his duty to use the best bidding systems and thereby assure California a fair return for its resources. The petitioners' argument, California contends, improperly assumes that the Secretary of the Interior would perversely refuse to adopt a non-cash-bonus bid-

ding system proved by experiment to be superior to the cash bonus alternatives.

We share California's confidence that, after experimentation, the Secretary would use the most successful bidding system on all suitable OCS lease tracts, including those off the California coast. For this reason, we agree with California that it has standing to challenge the Secretary of the Interior's refusal to experiment with non-cash-bonus bidding systems. Therefore, we proceed to the merits.

IV

In passing the 1978 Amendments, Congress committed the Government to the goal of obtaining fair market value for OCS oil and gas resources. The 1978 Amendments themselves proclaim this intention,[13] and the legislative history is replete with references to this purpose.[14] The respondents urge that non-cash-bonus bidding systems are more likely to achieve the statutory objectives than the cash bonus systems used to date, so that the Secretary of the Interior's continued reliance on cash bonus bidding violates the statutory scheme.

A

We begin, as always in a case in which the meaning of a statute is at issue, by examining Congress' language. If Congress meant to restrain the Secretary of the Interior's discretion in experimenting with the various alternative bidding systems, we can expect the statute to reflect that intent. But it does not.

Despite the various reservations concerning the traditional cash bonus bidding system recorded in the legislative history

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[13] Section 1344(a)(4) states that "[l]easing activities shall be conducted to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government."

[14] See, *e. g.*, H. R. Rep. No. 95–590, pp. 47, 54 (1977); S. Rep. No. 95–284, pp. 46, 73 (1977).

of the 1978 Amendments, Congress not only failed to repudiate the traditional cash bonus, fixed royalty system specified in § 1337(a)(1)(A), but affirmatively directed that the Secretary of the Interior use that system in the bidding for tracts covering at least 40% of the total area leased in each year of the 5-year plan. § 1337(a)(5)(B). The only express limitation Congress put on the use of the traditional system was that it not be used on more than 80% of the total area offered each year. *Ibid.* In short, Congress can hardly be said to have rejected even the traditional cash bonus system. Moreover, among the experimental bidding alternatives listed in the 1978 Amendments, Congress expressly specified cash bonus as the bid variable in three systems.[15] Most significantly, Congress left to "the discretion of the Secretary," § 1337(a)(1), the choice among the various nontraditional alternatives, evidently leaving to his expert administrative determination the complex, technical problem of deciding which alternative bidding systems are more likely to further the statute's objectives. In addition, Congress granted the Secretary further discretion to abandon the statutory requirements for the percentage use of the nontraditional alternatives, should he determine that those requirements are inconsistent with the statutory purposes and policies. § 1337(a)(5)(B).

The respondents argue that the Secretary's discretion is limited by § 1344(a)(4), which directs that "[l]easing activities shall be conducted to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government." According to the respondents, the Secretary is violating § 1344(a)(4) by refusing to try non-cash-bonus bid-

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[15] Those three are the cash bonus bid, diminishing or sliding-scale royalty system, § 1337(a)(1)(C), the cash bonus bid, fixed net profit-share system, § 1337(a)(1)(D), and the cash bonus bid, fixed royalty and fixed net profit-share system, § 1337(a)(1)(F).

ding, because cash bonus bidding allegedly does not assure that fair market value is received for the Government's resources.

Section 1344(a)(4) cannot support the weight the respondents attach to it. Section 1344 directs the Secretary of the Interior to "prepare and periodically revise, and maintain an oil and gas leasing program" consistent with the "principles" enumerated in §§ 1344(a)(1)–(4). The receipt of fair market value, the fourth listed principle, is only one of many general considerations commended to the Secretary's attention.[16] The section directs that the Secretary's entire leasing program be consistent with the principles enumerated. Yet elsewhere the statute requires the Secretary's program to use the traditional cash bonus, fixed royalty system on as

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[16] Also included, for example, are the "economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf." § 1344(a)(1). In addition, the Conference Report indicates that providing a fair return to the Federal Government is only one of many considerations the Secretary of the Interior is to weigh:

"The conferees intend that in utilizing the new bidding alternatives, a variety of considerations should be taken into account, including but not limited to: (i) Providing a fair return to the Federal Government; (ii) increasing competition; (iii) assuring competent and safe operations; (iv) avoiding undue speculation; (v) avoiding unnecessary delays in exploration, development, and production; (vi) discovering and recovering oil and gas; (vii) developing new oil and gas resources in an efficient and timely manner; and (viii) limiting administrative burdens on government and industry." H. R. Conf. Rep. No. 95–1474, p. 92 (1978).

The House Report reiterates the point, emphasizing that striking the proper balance among the factors is up to the Secretary of the Interior:

"One purpose of [the 1978 Amendments] is to authorize alternative leasing arrangements and require experimentation with them. It will enable the Secretary of the Interior, who administers the federal leasing program, to strike a proper balance between securing a fair return to the Federal Government for the lease of its lands, increasing competition in exploitation of resources, and providing the incentive of a fair profit to the oil companies, which must risk their investment capital." H. R. Rep. No. 95–590, p. 54 (1977).

much as 80%, and on no less than 40%, of the acreage leased. § 1337(a)(5)(B). So Congress cannot have considered the traditional cash bonus system incapable of providing a fair market return, for that is the one system Congress required the Secretary to use. We therefore conclude that § 1344 (a)(4) cannot fairly be read to constrain indirectly the Secretary's discretion in choosing to use the alternative cash bonus bidding systems.

The only express statutory check on the Secretary of the Interior's discretion is the requirement that he periodically report to the Congress his reasons for failing to use any of the alternative bidding systems.[17] The statute thus recognizes that, in appropriate circumstances, some of the alternative bidding systems may not be used. Plainly, Congress considered close congressional scrutiny to be sufficient restraint on the Secretary's discretion to choose among the statutory options.

In short, nothing in the statute suggests that Congress intended to channel the Secretary of the Interior's discretion in choosing among the alternative bidding systems, and nothing in the statute singles out the non-cash-bonus systems for special consideration. Therefore, we conclude that the language of the 1978 Amendments requires experimentation with at least some of the new bidding systems, but leaves the details to the Secretary's discretion.

B

According to the respondents, however, the legislative history of the 1978 Amendments mandates constraints on the Secretary of the Interior's discretion not expressly stated in

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[17] Section 1337(a)(9)(D) requires the Secretary of Energy, in consultation with the Secretary of the Interior, to report to Congress "why a particular bidding system has not been or will not be utilized." Section 1343(2)(A) requires the Secretary of the Interior to report to Congress "the reasons why a particular bidding system has not been utilized."

the statute. In particular, the respondents cite the repeated, unfavorable references to "cash bonus" bidding found throughout the legislative history to support their contention that Congress intended to direct the Secretary of the Interior to experiment with bidding systems in which the bidding variable is not the size of a cash bonus.

What clearly emerges from the legislative history, however, is not congressional dissatisfaction with all forms of cash bonus bidding, but rather with large front-end payments. Plainly, Congress intended to encourage more competitive bidding by requiring experimentation with bidding alternatives, regardless of the bid variable involved, that would reduce the size of the front-end payments associated with the traditional cash bonus bid, fixed royalty system.[18]

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[18] The Senate Report, S. Rep. No. 95–284, pp. 46–47, 73 (1977), put it this way:

"S. 9 authorizes a wide variety of new bidding systems. These are designed to reduce the front end cash bonus, increase the government's return on actual production of oil or gas, make it easier for smaller companies to enter the OCS development business, and increase the availability of funds for exploration.

. . . . . .

"In order to assure that these alternatives will be used, the bill limits the Secretary's authority to use the cash bonus-fixed royalty system which has been the historical method of OCS bidding . . . .

. . . . . .

"The basic thrust of all these new options is to reduce the reliance on large front-end cash bonuses as the means of obtaining a fair price for the public's property. The committee wants to authorize lease allocation systems that would encourage the widest possible participation in competitive lease sales consistent with receipt by the public of fair market value for its resources. The committee believes that net profits share and other arrangements can be effective in shifting Government revenue away from initial bonuses and into deferred payments made out of a leaseholder's profits based on actual production of oil or gas."

The House Report, H. Rep. No. 95–590, pp. 47, 138–139 (1977), echoes the Senate's conclusions:

"At present, the cash bonus system is used almost exclusively. Under

Such a reduction of the front-end payments can be achieved, however, with any bidding system that increases the amount of the payments made throughout the life of a lease, since a bidder will be willing to pay less "up front" if he expects to pay more "downstream." This inverse relationship between the size of up-front and downstream payments holds true, of course, regardless of which factor is used as a bidding variable. Congress plainly understood this relationship, because it expressly included three new cash bonus bid systems among the experimental alternatives intended to reduce large front-end payments.

Contrary to the respondents' suggestions, Congress' references to "bonus bidding" and the "cash bonus system," when seen in context, are merely a shorthand description of the

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that system, in order to win a lease, a company must have vast amounts of capital, and the price to the company is set without full knowledge of the value of the oil and gas in the area. This may reduce competition for off-shore leases to the major oil companies and reduce the public return for resources. To increase competition for off-shore leases and secure higher returns to the public Treasury, section 8 of the Outer Continental Shelf Lands Act has been amended to allow the Secretary to use other bidding methods based on net profits; royalty; or work commitments stated in dollar amounts.

. . . . . .

"Witnesses before the committee indicated that the high front-end bonus bids may have created a barrier to the entry of small and medium-sized oil firms as well as other potential exploiters, to the OCS activity, and that these types of bids do not, after the completion of exploitation of a lease area, provide a fair return to the Government.

. . . . . .

"[T]he 1977 amendments authorizes *[sic]* new bidding options. The basic thrust of all these new options is to reduce the reliance on large front-end cash bonuses as the means of obtaining a fair price for the public's property. . . .

"In order to assure that these new bidding alternatives are used, the 1977 amendments limit the Secretary's authority to use the cash bonus—fixed royalty system, which has been the historical method of OCS bidding."

traditional cash bonus bid, fixed royalty system that was the only system that had been extensively used at the time the 1978 Amendments were under consideration. That the term "bonus bidding" in context refers only to the traditional system is evident because Congress pointedly and repeatedly contrasted the perceived disadvantages of "bonus bidding" with its hopes for the alternatives listed in §§ 1337(a)(1)(B)–(G), although three of those enumerated alternatives retain the size of a cash bonus as the bidding variable. Congressional references to the "cash bonus system" thus implicate only the traditional system described in § 1337(a)(1)(A).[19]

V

In sum, we are unable to find anything, either in the legislative history or in the 1978 Amendments themselves, that compels the conclusion that the Congress as a whole intended to limit the Secretary of the Interior's discretion to choose among the various experimental bidding systems. It is not for us, or for the Court of Appeals, to decide whether the

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[19] Of many possible, a single example drawn from the Conference Report, H. R. Conf. Rep. No. 95–1474, p. 92 (1978), suffices to demonstrate this point. The Conference Report summarizes the statutory requirement in § 1337(a)(5)(B) that the Secretary of the Interior experiment with the enumerated alternative bidding systems as follows:

"Bidding systems other than bonus bidding, including royalty, net profit, work commitment, and nonenumerated systems, are to be utilized in at least 20 percent and not more than 60 percent of the tracts offered for leasing in *all* OCS areas during each of the next 5 years." (Emphasis in original.)

Plainly, the reference to "bonus bidding" is to the traditional system specified in § 1337(a)(1)(A). Otherwise, the summary is simply wrong, because three of the enumerated alternatives retain the size of a cash bonus as the bidding variable. Similar examples are found throughout the legislative history. See H. R. Rep. No. 95–590, pp. 47, 138–139, 141 (1977); S. Rep. No. 95–284, pp. 46–47 (1977); H. R. Conf. Rep. No. 95–1474, *supra*, at 93.

Secretary of the Interior is well advised to forgo experimentation with the non-cash-bonus alternatives. That question is for Congress alone to answer in the exercise of its oversight powers.

For these reasons, the judgment of the Court of Appeals compelling the use of non-cash-bonus bidding systems is hereby reversed.

It is so ordered.

NATIONAL LABOR RELATIONS BOARD *v.* HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80–885. Argued October 5, 1981—Decided December 2, 1981*

Held: There is a reasonable basis in law for the practice of the National Labor Relations Board (NLRB) of excluding from collective-bargaining units only those confidential employees with a "labor nexus," while rejecting any claim that all employees with access to confidential information are beyond the reach of the definition of "employee" in § 2(3) of the National Labor Relations Act (NLRA). Pp. 177–192.

(a) There is nothing in the Taft-Hartley Act's legislative history to support any inference, let alone conclusion, that Congress intended to alter, or disapproved, the NLRB's determination prior to the 1947 passage of the Act that only confidential employees with a "labor nexus" should be excluded from bargaining units. Rather, the contrary appears. Indeed, the Taft-Hartley Act's express inclusion of "professional employees" under the Act's coverage negates any reading of the legislative history as excluding confidential employees generally from § 2(3)'s definition of "employee." Pp. 177–185.

(b) The dictum in *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 284, n. 12, that Congress "clearly thought that the [NLRA] did not cover 'confidential employees,' even under a broad definition of that term," cannot be squared with congressional intent. Nor is there any merit to the argument that the NLRB has applied the labor-nexus test inconsistently. A review of the NLRB's decisions indicates that it has never followed a practice of depriving all employees who have access to confidential business information from the full panoply of rights afforded by the NLRA. Rather, for over 40 years, the NLRB, while declining to create any implied exclusion from the definition of "employee" for confidential employ-

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*Together with *National Labor Relations Board* v. *Malleable Iron Range Co.* (see this Court's Rule 19.4), and No. 80–1103, *Hendricks County Rural Electric Membership Corp.* v. *National Labor Relations Board*, also on certiorari to the same court.

ees, has applied a labor-nexus test in identifying those employees who should be excluded from bargaining units because of access to confidential business information. This consistent, longstanding interpretation of the NLRA by the NLRB cannot be ignored. Pp. 186–190.

627 F. 2d 766 and 631 F. 2d 734, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J. filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 192.

Deputy Solicitor General Wallace argued the cause for petitioner in No. 80–885 and respondent in No. 80–1103. With him on the briefs were *Solicitor General Lee*, former *Solicitor General McCree*, *Barry Sullivan*, *Norton J. Come*, and *Linda Sher*.

Warren D. Krebs argued the cause and filed a brief for Hendricks Rural Electric Membership Corp., respondent in No. 80–885 and petitioner in No. 80–1103. *Russ R. Mueller* argued the cause and filed a brief for Malleable Iron Range Co., respondent in No. 80–885.†

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether an employee who, in the course of his employment, may have access to information considered confidential by his employer is impliedly ex-

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†Briefs of *amici curiae* urging reversal in both No. 80–885 and No. 80–1103 were filed by *J. Albert Woll*, *Laurence Gold*, and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations; and by *John A. Fillion* for United Auto Workers. *Joseph E. Finley* filed a brief for the Office and Professional Employees International Union, AFL–CIO, CLC, urging reversal in No. 80–885.

David Crump filed a brief for the Legal Foundation of America as *amicus curiae* urging affirmance in both No. 80–885 and No. 80–1103.

Stephen A. Bokat filed a brief for the Chamber of Commerce of the United States as *amicus curiae* in both No. 80–885 and No. 80–1103.

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cluded from the definition of "employee" in § 2(3) of the National Labor Relations Act and denied all protections under the Act.[1]

I

We have before us two cases under the same docket number. We shall first state separately the factual and procedural background of each.

The Hendricks case

Mary Weatherman was the personal secretary to the general manager and chief executive officer of respondent Hendricks County Rural Electric Membership Corp. (Hendricks), a rural electric membership cooperative. She had been employed by the cooperative for nine years. In May 1977 she signed a petition seeking reinstatement of a close friend and fellow employee, who had lost his arm in the course of employment with Hendricks, and had been dismissed. Several days later she was discharged.

Weatherman filed an unfair labor practice charge with the National Labor Relations Board (NLRB or Board), alleging that the discharge violated § 8(a)(1) of the National Labor Relations Act (NLRA or Act), 29 U. S. C. § 158(a)(1). Hendricks' defense, *inter alia*, was that Weatherman was denied

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[1] Section 2(3), 61 Stat. 137, as set forth in 29 U. S. C. § 152(3), provides:

"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

the Act's protection because as a "confidential" secretary she was impliedly excluded from the Act's definition of "employee" in § 2(3). The Administrative Law Judge (ALJ) rejected this argument. He noted that the Board's decisions had excluded from bargaining units only those "confidential employees . . . ['Jwho assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.'" 236 N. L. R. B. 1616, 1619 (1978), quoting *B. F. Goodrich Co.*, 115 N. L. R. B. 722, 724 (1956). Applying this "labor nexus" test, the ALJ found that Weatherman was not in any event such a "confidential employee."[2] He also determined that Hendricks had discharged Weatherman for activity—signing the petition—protected by § 7 of the Act, 29 U. S. C. § 157.[3] The ALJ thus sustained Weatherman's unfair labor practice charge. The Board affirmed "the rulings, findings, and conclusions of the Administrative Law Judge," and ordered that Weatherman be reinstated with backpay. 236 N. L. R. B., at 1616.

Hendricks sought review in the United States Court of Appeals for the Seventh Circuit and the Board cross-petitioned for enforcement. A divided panel of the court reversed and remanded for further proceedings. 603 F. 2d 25 (1979). Although the majority agreed with the Board's factual finding that Weatherman did not "assist in a confidential capacity with respect to labor relations policies," *id.*, at 28, the majority, relying on language in a footnote to *NLRB* v. *Bell Aero-*

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[2] The ALJ held that although the Board excluded confidential employees with a labor nexus from bargaining units, it afforded them the other protections of the NLRA. Therefore, the ALJ held, even if Weatherman were a confidential employee excludable from a bargaining unit, § 8(a)(1) barred Hendricks from discharging Weatherman for engaging in protected concerted activity.

[3] The Board has held that circulation of a petition on behalf of a discharged employee is protected activity under § 7. *Youngstown Osteopathic Hospital Assn.*, 224 N. L. R. B. 574 (1976).

space Co., 416 U. S. 267, 284, n. 12 (1974), held that "*all* secretaries working in a confidential capacity, without regard to labor relations, [must] be excluded from the Act." 603 F. 2d, at 30.[4] The Court of Appeals therefore remanded for a determination whether Weatherman came within this substantially broader definition of confidential secretary.

On remand, the Board found that Weatherman was not privy to the confidences of her employer and thus concluded that she did not fall within the broader definition of confidential secretary that the Court of Appeals had directed the Board to apply. 247 N. L. R. B. 498 (1980).[5] Hendricks again petitioned for review and the Board cross-petitioned for enforcement. The Court of Appeals, by a divided panel, denied enforcement. 627 F. 2d 766 (1980). The majority held that the Board had "actually reapplie[d] the old standard incorporating the labor nexus," and that the evidence in the

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[4]Judge Bonsal, sitting by designation, dissented, being of the view that the record established that Weatherman was not a confidential employee.

[5]The Board stated in part:

"Although Weatherman typed all of [general manager] Dillon's letters, this correspondence apparently did not relate to labor relations or personnel matters other than occasional letters referring to the dates of negotiating meetings with a union. Nor is there any evidence that it concerned confidential matters of any description. Weatherman generally did not place Dillon's telephone calls, nor did she keep a record of his appointments. Weatherman did share a partitioned office with Dillon, but no personnel records or confidential records of any type were kept there, excluding Dillon's testimony that he kept some papers concerning labor negotiations in a file behind his desk. Weatherman did not attend meetings of Respondent's board of directors or other management meetings. However, she did type minutes of meetings of the board of directors and the agenda for such meetings. While these meetings apparently occasionally involved personnel matters, there is no indication that such matters, or any other issues discussed during them, were confidential. Weatherman did not type internal memoranda regarding labor relations or personnel or employment matters. Finally, and most significantly, Dillon conceded at the hearing that the Respondent did not maintain secret or classified papers or documents." 247 N. L. R. B., at 498–499 (footnotes omitted).

record failed to support a finding that Weatherman did not come within the court's broader definition of confidential secretary. *Id.*, at 770.[6]

The Malleable case

This case grew out of efforts of the Office and Professional Employees International Union (Union) to represent, as collective-bargaining agent, various employees of respondent Malleable Iron Range Co. (Malleable). In December 1978 the Union sought certification as the collective-bargaining representative for a unit of office clerical, technical, and professional personnel employed at the respondent's facility in Beaver Dam, Wis. At the subsequent representation hearing, Malleable challenged the inclusion of 18 employees in the unit on the ground that they had access to confidential business information. The Regional Director of the NLRB rejected Malleable's objection, concluding that none of the challenged 18 employees was a confidential employee under the Board's "labor nexus" test. App. to Pet. for Cert. 76a–94a. The Union prevailed in a later representation election, and was accordingly certified as the bargaining agent for the unit. Malleable nevertheless refused to bargain with the Union. Seeking relief, the Union filed unfair labor practice charges with the NLRB. The Board found that Malleable's refusal to bargain violated §§ 8(a)(5) and (1) of the Act, 29 U. S. C. §§ 158(a)(5) and (1), and issued a bargaining order. 244 N. L. R. B. 485 (1979).

Malleable petitioned the Court of Appeals for the Seventh Circuit for review of the order and the Board cross-petitioned for enforcement. In an unreported opinion, a divided panel of the court denied enforcement. App. to Pet. for Cert.

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[6]Judge Cudahy dissented. He suggested, *inter alia*, that there "is abundant evidence in the record to support the Board's conclusion that Weatherman is not properly classified as a confidential secretary." 627 F. 2d, at 771.

56a–60a. Order denying enforcement, 631 F. 2d 734 (1980). The majority noted that the Regional Director, in determining that none of the 18 individuals was a confidential employee, had applied the Board's labor-nexus test which the Seventh Circuit had rejected in the earlier decisions involving Hendricks. The court remanded the case to the Board for reconsideration consistent "with the *Hendricks* case." App. to Pet. for Cert. 56a, 59a.

We granted the Board's petition for certiorari in both cases to resolve the conflict among the Courts of Appeals respecting the propriety of the Board's practice of excluding from collective-bargaining units only those confidential employees with a "labor nexus," while rejecting any claim that all employees with access to confidential information are beyond the reach of § 2(3)'s definition of "employee."[7] 450 U. S. 964 (1981). We hold that there is a reasonable basis in law for the Board's use of the "labor nexus" test. We therefore reverse the judgments of the Court of Appeals, with directions in the *Hendricks* case to enforce the Board's order,[8] and with

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[7] Cf. *Union Oil of California, Inc.* v. *NLRB*, 607 F. 2d 852, 853–854 (CA9 1979); *NLRB* v. *Allied Products Corp.*, 548 F. 2d 644, 648 (CA6 1977); *Westinghouse Electric Corp.* v. *NLRB*, 398 F. 2d 669, 670 (CA6 1968); *NLRB* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690, 694 (CA4 1963); *NLRB* v. *Armour & Co.*, 154 F. 2d 570, 573–574 (CA10 1945); *NLRB* v. *Poultrymen's Service Corp.*, 138 F. 2d 204, 210–211 (CA3 1943).

[8] We also granted Hendricks' cross-petition in No. 80–1103, which presented the question whether the Court of Appeals properly rejected Hendricks' claim that Weatherman was the functional equivalent of a personnel department employee and therefore excluded from coverage of the Act on that basis as well. After briefing and argument, however, we are persuaded that our grant of certiorari on the cross-petition was improvident. The Court of Appeals held that the evidence in the record supported the Board's finding that Weatherman was not the functional equivalent of a personnel department employee. As such, we are presented primarily with a question of fact, which does not merit Court review. The writ of certiorari in No. 80–1103 is therefore dismissed as improvidently granted. See *Rudolph* v. *United States*, 370 U. S. 269 (1962) *(per curiam)*; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508 (1924).

directions in the *Malleable* case for further proceedings consistent with this opinion.

II

Section 2(3) of the NLRA provides that the "term 'employee' shall include *any* employee . . ." (emphasis added), with certain stated exceptions such as "agricultural laborers," "supervisors" as defined in § 2(11), and "independent contractors."[9] Under a literal reading of the phrase "any employee," then, the workers in question are "employees." But for over 40 years, the NLRB, while rejecting any claim that the definition of "employee" in § 2(3) excludes confidential employees, has excluded from the collective-bargaining units determined under the Act those confidential employees satisfying the Board's labor-nexus test. Respondents Hendricks and Malleable (hereafter respondents) argue that contrary to the Board's practice, all employees who may have access to confidential business information are impliedly excluded from the definition of employee in § 2(3).

In assessing the respondents' argument, we must be mindful of the canon that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially where Congress has refused to alter the administrative construction." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 381 (1969) (footnote omitted); see *NLRB* v. *Bell Aerospace Co.*, 416 U. S., at 274–275; *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965). We therefore proceed to review the Board's determinations from 1940 to 1946 whether confidential employees were "employees" within § 2(3) of the NLRA (Wagner Act), and then determine whether Congress, when it considered those determinations in enacting the Labor Management Relations Act of 1947 (Taft-Hartley Act), intended to alter the Board's practice.

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[9] For the full text of the current definition, see n. 1, *supra*.

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In 1935 the Wagner Act became law. 49 Stat. 449. The Act's broad objectives were to "encourag[e] the practice and procedure of collective bargaining and . . . protec[t] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." *Id.*, at 449–450. The employees covered by the Act were defined in § 2(3): "The term 'employee' shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse." Although the Act's express exclusions did not embrace confidential employees, the Board was soon faced with the argument that all individuals who had access to confidential information of their employers should be excluded, as a policy matter, from the definition of "employee." The Board rejected such an implied exclusion, finding it to have "no warrant under the Act." *Bull Dog Electric Products Co.*, 22 N. L. R. B. 1043, 1046 (1940). See also *Creamery Package Manufacturing Co.*, 34 N. L. R. B. 108, 111 (1941). But in fulfilling its statutory obligation to determine appropriate bargaining units under § 9 of the Act, 29 U. S. C. § 159, for which broad discretion has been vested in the Board, see *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485, 491–492 (1947); *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U. S. 146 (1941), the Board adopted special treatment for the narrow group of employees with access to confidential, labor-relations information of the employer. The Board excluded these individuals from bargaining units composed of rank-and-file workers.[10] See, *e. g.*, *Brooklyn Daily Eagle*, 13

[10] Although the early decisions did not explicitly preclude the Board from certifying a bargaining unit composed solely of confidential employees, that possibility was apparently foreclosed in *Hoover Co.*, 55 N. L. R. B. 1321,

N. L. R. B. 974, 986 (1939); *Creamery Package Manufacturing Co., supra*, at 110. The Board's rationale was that "management should not be required to handle labor relations matters through employees who are represented by the union with which the [c]ompany is required to deal and who in the normal performance of their duties may obtain advance information of the [c]ompany's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters." *Hoover Co.*, 55 N. L. R. B. 1321, 1323 (1944).

Following its formulation, through 1946, the Board routinely applied the labor-nexus test in numerous decisions to identify those individuals who were to be excluded from bargaining units because of their access to confidential information.[11] And in at least one instance in which a Court of Ap-

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1322–1323 (1944), and *Electric Boat Co.*, 57 N. L. R. B. 1348, 1349 (1944), thereby excluding confidential employees, as defined by the Board, from collective-bargaining units.

[11] See *Warner Brothers Pictures, Inc.*, 35 N. L. R. B. 739, 744 (1941); *Chrysler Corp.*, 36 N. L. R. B. 157, 161–162 (1941); *Western Union Telegraph Co.*, 36 N. L. R. B. 1066, 1069 (1941); *General Motors Corp.*, 37 N. L. R. B. 441, 446–447 (1941); *Montgomery Ward & Co.*, 38 N. L. R. B. 297, 300 (1942); *Chrysler Detroit Co.*, 38 N. L. R. B. 313, 321 (1942); *Cincinnati Times-Star Co.*, 39 N. L. R. B. 39, 42 (1942); *Poultrymen's Service Corp.*, 41 N. L. R. B. 444, 448 (1942), enf'd, 138 F. 2d 204 (CA3 1943); *Polish National Alliance*, 42 N. L. R. B. 1375, 1381–1382 (1942), enf'd as modified, 136 F. 2d 175 (CA7 1943), aff'd, 322 U. S. 643 (1944); *Bendix Products Division*, 43 N. L. R. B. 912, 915–916 (1942); *Paramount Pictures, Inc.*, 45 N. L. R. B. 116, 122–123 (1942); *Murray Corp.*, 45 N. L. R. B. 854, 856–857 (1942); *Puget Sound Bridge & Dredging Co.*, 46 N. L. R. B. 1071, 1074 (1943); *Bohn Aluminum & Brass Corp.*, 47 N. L. R. B. 1229, 1231 (1943); *Armour & Co.*, 49 N. L. R. B. 688, 690 (1943); *Firestone Tire & Rubber Co.*, 50 N. L. R. B. 679, 682 (1943); *Boston Edison Co.*, 51 N. L. R. B. 118, 123 (1943); *Republic Steel Corp.*, 51 N. L. R. B. 1228, 1230 (1943); *St. Johns River Shipbuilding Co.*, 52 N. L. R. B. 12, 17 (1943); *General Motors Corp.*, 52 N. L. R. B. 649, 653–655 (1943); *Babcock & Wilcox Co.*, 52 N. L. R. B. 900, 903 (1943); *U. S. Smelting, Refining & Mining Co.*, 53 N. L. R. B. 84, 86 (1943); *New York*

peals had occasion to review the Board's application of a labor-nexus test under the Wagner Act, the test was upheld. *NLRB* v. *Poultrymen's Service Corp.*, 138 F. 2d 204, 210–211 (CA3 1943). See also *NLRB* v. *Armour & Co.*, 154 F. 2d 570, 573–574 (CA10 1945); *Polish National Alliance* v. *NLRB*, 136 F. 2d 175, 180 (CA7 1943), aff'd, 322 U. S. 643 (1944).

In 1946, in *Ford Motor Co.*, 66 N. L. R. B. 1317, 1322, the Board refined slightly the labor-nexus test because in its view the "definition [was] too inclusive and needlessly preclude[d] many employees from bargaining collectively together with other workers having common interests." Henceforth, the Board announced, it intended "to limit the term 'confidential' so as to embrace only those employees who assist and act in a confidential capacity to persons who

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Telephone Co., 53 N. L. R. B. 307, 310 (1943); *Potash Co.*, 53 N. L. R. B. 441, 444 (1943); *Coolerator Co.*, 53 N. L. R. B. 461, 462–464 (1943); *Colonial Broach Co.*, 53 N. L. R. B. 846, 848 (1943); *General Motors Corp.*, 53 N. L. R. B. 1096, 1100 (1943); *Consolidated Vultee Aircraft Corp.*, 54 N. L. R. B. 103, 112–114 (1943); *Armour & Co.*, 54 N. L. R. B. 1005, 1013 (1944), enf'd as modified, 154 F. 2d 570 (CA10 1945); *Armour & Co.*, 54 N. L. R. B. 1462, 1465 (1944); *General Cable Corp.*, 55 N. L. R. B. 1143, 1145–1146 (1944); *Hoover Co.*, 55 N. L. R. B. 1321, 1322–1323 (1944); *West Penn Power Co.*, 55 N. L. R. B. 1356, 1358 (1944); *Spicer Manufacturing Corp.*, 55 N. L. R. B. 1491, 1503 (1944); *Bell Aircraft Corp.*, 56 N. L. R. B. 1356, 1359 (1944); *General Motors Corp.*, 56 N. L. R. B. 1547, 1549–1550 (1944); *Utah Copper Co.*, 57 N. L. R. B. 308, 315–318 (1944); *Electric Boat Co.*, 57 N. L. R. B. 1348, 1349 (1944); *Chrysler Corp.*, 58 N. L. R. B. 239, 243–246 (1944); *American Steel & Wire Co.*, 58 N. L. R. B. 253, 255 (1944); *U. S. Automatic Corp.*, 58 N. L. R. B. 662, 664 (1944); *South Bend Lathe Works*, 59 N. L. R. B. 562, 564 (1944); *Houdaille-Hershey Corp.*, 59 N. L. R. B. 1292, 1295 (1944); *Aluminum Co. of America*, 60 N. L. R. B. 388, 391 (1945); *Consolidated Vultee Aircraft Corp.*, 60 N. L. R. B. 525, 527 (1945); *Continental Steel Corp.*, 61 N. L. R. B. 97, 99–102 (1945); *American Smelting and Refining Co.*, 61 N. L. R. B. 506, 508–509 (1945); *Pacific Gas & Electric Co.*, 61 N. L. R. B. 564, 568 (1945); *Magnolia Pipe Line Co.*, 61 N. L. R. B. 723, 726–728 (1945); *Bethlehem Steel Co.*, 63 N. L. R. B. 1230, 1234–1236 (1945).

exercise 'managerial' functions in the field of labor relations."[12] This was the state of the law in 1947 when Congress amended the NLRA through the enactment of the Taft-Hartley Act. 61 Stat. 136.

B

Although the text of the Taft-Hartley Act also makes no explicit reference to confidential employees, when Congress addressed the scope of the NLRA's coverage, the status of confidential employees was discussed. But nothing in that legislative discussion supports any inference, let alone conclusion, that Congress intended to alter the Board's pre-1947 determinations that only confidential employees with a "labor nexus" should be excluded from bargaining units. Indeed, the contrary appears.

The Taft-Hartley Act was in part a response to the Court's decision in *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485 (1947), which upheld the Board's certification of a bargaining unit composed of plant foremen. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S., at 279. Although the House and Senate initially passed differing bills, both Houses explicitly excluded "supervisors" from the definition of "employee" in the NLRA. H. R. 3020, 80th Cong., 1st Sess., § 2(3) (1947); S. 1126, 80th Cong., 1st Sess., § 2(3) (1947). In defining the term "supervisor," however, the bills differed substantially. The House bill defined "supervisor" to include within its scope the confidential employee, broadly defined as one "who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for

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[12] The *Ford Motor* approach was followed in three decisions in 1946. *St. Louis Independent Packing Co.*, 67 N. L. R. B. 543, 547; *Tennessee Gas & Transmission Co.*, 67 N. L. R. B. 1375, 1379; *Brown & Sharpe Manufacturing Co.*, 68 N. L. R. B. 487, 489.

use in the interest of the employer."[13] The Senate, on the other hand, did not include the confidential employee within its definition of "supervisor."[14]

The differing House and Senate bills were submitted to a Conference Committee. In Committee, the Senate definition of "supervisor," with no reference to confidential em-

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[13] Section 2(12) of the House bill read in its entirety:

"The term 'supervisor' means any individual—

"(A) who has authority, in the interest of the employer—

"(i) to hire, transfer, suspend, lay off, recall, promote, demote, discharge, assign, reward, or discipline any individuals employed by the employer, or to adjust their grievances, or to effectively recommend any such action; or

"(ii) to determine, or make effective recommendations with respect to, the amount of wages earned by any individuals employed by the employer, or to apply, or to make effective recommendations with respect to the application of, the factors upon the basis of which the wages of any individuals employed by the employer are determined, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment;

"(B) who is employed in labor relations, personnel, employment, police, or time-study matters or in connection with claims matters of employees against employers, or who is employed to act in other respects for the employer in dealing with other individuals employed by the employer, or who is employed to secure and furnish to the employer information to be used by the employer in connection with any of the foregoing; or

"(C) who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer."

[14] The Senate bill defined "supervisor" in § 2(11) in the following terms:

"The term 'supervisor' means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The Senate Committee that reported the bill out apparently considered

ployees, prevailed. As described in the statement of the House Managers, appended to the Conference Report:

> "The conference agreement, in the definition of 'supervisor,' limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in the labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947).[15]

With this understanding, both Houses adopted the Conference Report, 93 Cong. Rec. 6393 (1947) (House); *id.*, at 6536

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but rejected a more expansive definition. See S. ——, 80th Cong., 1st Sess., § 2(12) (1947) (Act amending NLRA; Comm. Print, Mar. 19, 1947); S. ——, 80th Cong., 1st Sess., § 2(12) (1947) (Act amending NLRA; Comm. Print, Mar. 21, 1947).

[15] Senator Taft similarly described the Conference Committee's action in a written summary inserted in the Congressional Record:

"Supervisors: Both the House bill and the Senate amendment excluded supervisors from the individuals deemed to be employees for the purposes of the act. There was a sharp divergence between the House and Senate, however, with respect to the occupational groups which fell within this definition. The Senate amendment, which the conference ultimately adopted, is limited to bona fide supervisors. The House had included numerous other classes. There were generally (A) certain personnel who fix the amount of wages earned by other employees, such as inspectors, checkers, weighmasters, and time-study personnel, (B) labor relations personnel, police, and claims personnel, and (C) *confidential employees.* The Senate amendment confined the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank." 93 Cong. Rec. 6442 (1947) (emphasis added).

(Senate). Although President Truman vetoed the Taft-Hartley bill, see *id.*, at 7485–7488 (veto message), the bill nevertheless became law when Congress successfully overrode the veto, *id.*, at 7489 (House); *id.*, at 7538 (Senate).

The Court of Appeals interpreted the legislative history of Congress' exclusion of "supervisors" from the definition of "employees" as warranting an implied exclusion for all workers who may have access to confidential business information of their employer. That interpretation must be rejected. It is flatly belied by the Conference Committee's rejection of the House proposal of an exclusion of all confidential employees—for obviously the House conceded on this issue to the Senate.[16]

Indeed, the Taft-Hartley Act's express inclusion of "professional employees" under the Act's coverage[17] negates any reading of the legislative history as excluding confidential employees generally from the definition of employee in § 2(3). The definition of professional employees was intended to cover "such persons as legal, engineering, scientific and med-

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[16] This concession is clear in the comments made by Representative Hartley, sponsor of the House bill, in explaining to the full House the results of the House-Senate Conference:

"Entirely too much emphasis has been placed on the so-called concessions that the House conferees made during the conference. I will be very frank and say that I agreed to some of these concessions very reluctantly. I would much rather have seen the House bill as it originally passed enacted into law, but I want to see a bill that can be enacted into law passed by this Congress. . . .

"I also want to make it perfectly clear that there was no concession made except upon the assurance that it would provide us votes in another body to be certain that the legislation would be enacted into law." *Id.*, at 6383–6384.

[17] See § 9(b) of the NLRA, 29 U. S. C. § 159(b) (providing that the Board may not approve a bargaining unit "if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit"); § 2(12), 29 U. S. C. § 152(12) (defining "professional employee").

ical personnel together with their junior professional assistants." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 36 (1947).[18] But surely almost all such persons would likely be privy to confidential business information and thus would fall within the broad definition of confidential employee excluded under the House bill. It would therefore be extraordinary to read an implied exclusion for confidential employees into the statute that would swallow up and displace almost the entirety of the professional-employee inclusion.

Plainly, too, nothing in the legislative history of the Taft-Hartley Act provides any support for the argument that Congress disapproved the Board's prior practice of applying a labor-nexus test to identify confidential employees whom the Board excluded from bargaining units. To the contrary, the House Managers' statement accompanying the Conference Committee Report indicates that Congress intended to leave the Board's historic practice undisturbed.[19]

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[18] The House bill did not define "professional employees," but did explicitly give "any craft, department, plant, trade, calling, *profession* or other distinguishable group within a proposed bargaining unit" the opportunity to exclude itself from the bargaining unit. H. R. 3020, 80th Cong., 1st Sess., § 9(f)(2) (1947) (emphasis added). The Senate bill similarly allowed groups of professional employees to exclude themselves from bargaining units, § 9(b)(1), but in addition defined the term "professional employee." The version that ultimately was adopted by both Houses incorporated the Senate's definition of professional employee and permitted groups of professional employees to exclude themselves from proposed bargaining units in which nonprofessional employees were to be included. See n. 17, *supra*.

[19] It is true that the Conference Committee Report, in stating that the Board had treated confidential employees as "outside the scope of" the Wagner Act, could suggest that Congress failed to discern the Board's actual practice of excluding confidential employees, as defined by the labor-nexus test, from bargaining units, but still affording them the other protections of the Act. See, *e. g.*, *Bethlehem Steel Co.*, 63 N. L. R. B. 1230, 1232, and n. 2 (1945); *Southern Colorado Power Co.*, 13 N. L. R. B. 699, 710 (1939), enf'd, 111 F. 2d 539 (CA10 1940). Whether Congress' use of that phrase indicates that it misperceived the state of the law in this re-

III

The Court of Appeals, and the respondents here, rely on dictum in a footnote to *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267 (1974), to suggest that the 80th Congress believed that all employees with access to confidential business information of their employers had been excluded from the Wagner Act by prior NLRB decisions and that Congress intended to freeze that interpretation of the Wagner Act into law. The *Bell Aerospace* dictum is:

> "In 1946 in *Ford Motor Co.*, 66 N. L. R. B. 1317, 1322, the Board had narrowed its definition of 'confidential employees' to embrace only those who exercised '"managerial" functions in the field of labor relations.' The dis-

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spect is not clear since the Board itself, in several instances, had used a similarly imprecise shorthand description of its practice with respect to confidential employees. See *General Motors Corp.*, 53 N. L. R. B., at 1098; *Armour & Co.*, 49 N. L. R. B., at 690; *Armour & Co.*, 54 N. L. R. B., at 1465. JUSTICE POWELL, in dissent, relying in part on the conferees' use of the phrase "outside the scope of," criticizes the Board's practice of allowing "labor nexus" employees some protections under the Act. Because we hold that the Board properly determined that neither the secretary in *Hendricks* nor the 18 workers in *Malleable* were "labor nexus" employees, we have no occasion in this case to decide the propriety of this aspect of the Board's practice. That question will be more properly addressed in a case that presents it.

Whether Congress intended to leave the Board free to *depart* from a labor-nexus test is not entirely clear from the House Managers' statement. The statement may be read as indicating that Congress embraced the "prevailing Board practice with respect to" confidential employees. And as previously discussed, *supra*, at 178–181, the Board had consistently applied a labor-nexus test in defining confidential employees under the Wagner Act. But the declaration by the House Managers that the conferees did not intend "to alter" the Board's practice "in any respect" may alternatively be read as suggesting that Congress recognized this area as one for the exercise of Board expertise and judgment. The House Managers' suggestion that "presumably" the Board would continue its prevailing practice with respect to certain classes of employees is consistent with such a deferential reading. Because neither reading of the legislative history affords any comfort to respondents, we need not decide which is proper.

> cussion of 'confidential employees' in both the House and Conference Committee Reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those in 'labor relations.' Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover 'confidential employees' even under a broad definition of that term." *Id.*, at 284, n. 12.

Obviously this statement was unnecessary to the determination whether *managerial* employees are excluded from the Act, which was the question decided in *Bell Aerospace*. In any event, the statement that Congress "clearly thought that the Act did not cover 'confidential employees,' even under a broad definition of that term," is error. The error is clear in light of our analysis above of the legislative history of the Taft-Hartley Act pertinent to the question. Moreover, the footnote erroneously implies that *Ford Motor Co.*, 66 N. L. R. B. 1317 (1946), marked a major departure from the Board's prior practice. To the contrary, that Board decision introduced only a slight refinement of the labor-nexus test which the Board had applied in numerous decisions from 1941 to 1946. See n. 11, *supra*. Certainly the Conference Committee, in approving the Board's "prevailing practice," was aware of the Board's line of decisions.[20] Cf. *Cannon* v. *Uni-*

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[20] Indeed, the Board's labor-nexus test had been brought to the attention of the Congress through the NLRB's annual reports. See, *e. g.*, 10 NLRB Ann. Rep. 34, and n. 92 (1946). Significantly, the NLRB's report submitted to Congress on January 3, 1947, five months before the Conference Committee Report was issued, described the Board's refinement of the labor-nexus test in *Ford Motor*. See 11 NLRB Ann. Rep. 32, and nn. 18–21 (1947).

Citing two *1941* NLRB decisions, *E. P. Dutton & Co.*, 33 N. L. R. B. 761; *Montgomery Ward & Co.*, 36 N. L. R. B. 69, JUSTICE POWELL finds "support in the case law" for his assertion that it was Congress' understanding that the Board had previously excluded from the Act all secretaries with access to confidential information, without regard to

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versity of Chicago, 441 U. S. 677, 696–699 (1979). Thus the only plausible interpretation of the Report is that, in describing the Board's prevailing practice of denying certain employees the full benefits of the Wagner Act, the Report referred only to employees involved in labor relations, personnel and employment functions, and confidential secretaries *to such persons*. For that, in essence, is where the Board law as of 1947 stood. It follows that the dictum in *Bell Aerospace*, and the Court of Appeals' reliance upon it, cannot be squared with congressional intent, and should be "recede[d] from" now that the issue of the status of confidential employees is "squarely presented." *NLRB* v. *Boeing Co.*, 412 U. S. 67, 72 (1973).

We also find no merit in the respondents' argument that the Board has applied the labor-nexus test inconsistently. As noted earlier, *supra*, at 178–181, the Board, in excluding "confidential employees" from bargaining units, routinely applied such a test in the six years preceding the enactment of Taft-Hartley. In the years following the passage of the Taft-Hartley Act, the Board continued to apply the labor-nexus criterion in determining whether individuals were to be excluded from bargaining units as confidential employees. In *B. F. Goodrich Co.*, 115 N. L. R. B. 722 (1956), the Board

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labor nexus. *Post*, at 196, n. 7. The significance he would give these two cases is clearly unwarranted. *E. P. Dutton* rested explicitly on the seminal labor-nexus decision in *Brooklyn Daily Eagle*, 13 N. L. R. B. 974 (1939), to exclude three secretaries from a bargaining unit. 33 N. L. R. B., at 767–768, n. 8. And in *Montgomery Ward & Co.*, *supra*, the Board relied in turn on *E. P. Dutton*. See *Montgomery Ward & Co.*, *supra*, at 73, n. 6, citing *E. P. Dutton*. But whatever support JUSTICE POWELL may find in these two decisions for his understanding of Board law *in 1941*, his reading of congressional awareness is plainly erroneous; it entirely ignores congressional acceptance of the countless Board decisions between 1941 and 1947 in which the NLRB, in determining whether individuals were confidential employees excludable from bargaining units, *consistently and explicitly* required a labor nexus. See n. 11, *supra*.

reaffirmed its previous ruling in *Ford Motor* and underscored its intention "in future cases . . . to limit the term 'confidential' so as to embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." 115 N. L. R. B., at 724 (footnote omitted) (emphasis deleted).[21] In succeeding years, while continuing to apply the labor-nexus test, the Board has deviated from that stated intention in only one major respect: it has also, on occasion, consistent with the underlying purpose of the labor-nexus test, see *supra*, at 179, designated as confidential employees persons who, although not assisting persons exercising managerial functions in the labor-relations area, "regularly have access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations." *Pullman Standard Division of Pullman, Inc.*, 214 N. L. R. B. 762, 762–763 (1974); see *Triangle Publications, Inc.*, 118 N. L. R. B. 595, 596, and nn. 3–4 (1957).

In sum, our review of the Board's decisions indicates that the Board has never followed a practice of depriving all employees who have access to confidential business information from the full panoply of rights afforded by the Act. Rather, for over 40 years, the Board, while declining to create any implied exclusion from the definition of "employee" for confidential employees, has applied a labor-nexus test in identifying those employees who should be excluded from bargaining units because of access to confidential business information.[22] We cannot ignore this consistent, longstanding

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[21] The *B. F. Goodrich* decision was apparently prompted by the fact that the Board, on several occasions following the *Ford Motor* decision, had returned to its prior practice of designating as "confidential employees" those with mere access to confidential, labor-relations information. See *Bond Stores, Inc.*, 99 N. L. R. B. 1029, 1031, n. 4 (1952); *Minneapolis-Honeywell Regulator Co.*, 107 N. L. R. B. 1191, 1192 (1954).

[22] Indeed, while it may be true that the Board's formulation of the labor-

interpretation of the NLRA by the Board. See *Bell Aerospace*, 416 U. S., at 275; *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S., at 381.

IV

The Court's ultimate task here is, of course, to determine whether the Board's "labor nexus" limitation on the class of confidential employees who, although within the definition of "employee" under § 2(3), may be denied inclusion in bargaining units has "a reasonable basis in law." See *Ford Motor Co.* v. *NLRB*, 441 U. S. 488, 497 (1979); *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 166 (1971); *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131 (1944). Clearly the NLRB's longstanding practice of excluding from bargaining units only those confidential employees satisfying the Board's labor-nexus test, rooted firmly in the Board's understanding of the nature of the collective-bargaining process, and Congress' acceptance of that practice, fairly demonstrates that the Board's treatment of confidential employees does indeed have "a reasonable basis in law." We therefore return finally to the disposition of the cases before us.

Hendricks

In *Hendricks*, the Board determined that the personal secretary, Mary Weatherman, was not a confidential secretary because she "did not act 'in a confidential capacity'" with respect to labor-relations matters. 236 N. L. R. B., at 1619. While the Court of Appeals affirmed this finding, it denied enforcement of the Board's order on the basis that the evidence failed to support the Board's additional finding, required by the Court of Appeals, that Weatherman had no access to confidential *non*-labor-related information. In

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nexus test has deviated in minor respects over the years, the refinements are of the sort that are to be expected—if not required—in the process of case-by-case adjudication by an administrative agency.

approving the Board's limited labor-nexus exclusion, we have held that such a finding is irrelevant to the determination of whether the secretary was a confidential employee. In this Court respondent Hendricks does not argue that Weatherman came within the labor-nexus test as formulated by the Board, but rather concedes that Weatherman did not have "confidential duties 'with respect to labor policies.'" Brief for Respondent Hendricks 43. Because there is thus no dispute in this respect, and in any event no suggestion that the Board's finding regarding labor nexus was not supported by substantial evidence, we conclude that the Court of Appeals erred in holding that the record did not support the Board's determination that Weatherman was not a confidential employee with a labor nexus.[23] We therefore reverse the judgment of the Court of Appeals in *Hendricks* insofar as enforcement of the Board's order was denied, and remand with directions to enter an order enforcing the Board's order.

Malleable

In *Malleable*, as well, the respondent makes no argument that the 18 employees in question satisfy the labor-nexus test of the Board. Rather, Malleable argues, and the Court of Appeals held, that the Board should have applied a broader definition of confidential employee to include all employees in possession of confidential business information. Having rejected the broad exclusion on which the Court of Appeals' judgment relies, we reverse that judgment. But because the Court of Appeals has not yet addressed Malleable's con-

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[23] We do not suggest that personal secretaries to the chief executive officers of corporations will ordinarily not constitute confidential employees. *Hendricks* is an unusual case, inasmuch as Weatherman's tasks were "deliberately restricted so as to preclude her from" gaining access to confidential information concerning labor relations. 236 N. L. R. B. 1616, 1619 (1978). Whether Hendricks imposed such constraints on Weatherman out of specific distrust or merely a sense of caution, it is unlikely that Weatherman's position mirrored that of executive secretaries in general.

tentions that some of the 18 employees should have been excluded from the bargaining unit for reasons entirely unrelated to whether they are confidential employees,[24] we remand *Malleable* for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, concurring in part and dissenting in part.

I concur in the Court's holding that employees in the possession of proprietary or nonpublic business information are not for that reason excluded from the NLRA as "confidential" employees. By explicitly providing for the inclusion of professional employees, the Act itself indicates that Congress did not intend such a sweeping definition of the confidential employee exclusion. But because the majority's decision "tends to obliterate the line between management and labor,"[1] a line which Congress insisted be observed by enacting the Taft-Hartley Act, I dissent from the conclusion that the confidential secretary in this litigation[2] is not a confidential employee excluded from the Act.

I

In *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267 (1974), we

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[24] Malleable apparently seeks to argue that 13 of the challenged persons should be excluded as "managerial" employees, and that another 4 should be excluded as "supervisors." Brief for Malleable in Opposition 2, n. 1.

[1] *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485, 494 (1947) (Douglas, J., dissenting).

[2] The secretary here had worked for four years as the personal secretary to the general manager, the chief executive officer of the company. She opened his mail, typed his letters, answered the phone, and typed the minutes of meetings of the board of directors. She and the general manager shared a single office with a 6-foot partition in between their desks. She could overhear his telephone conversations when he raised his voice. She handled no labor relations materials.

held that all managerial employees were excluded from the Act regardless of whether they had a "labor nexus." In reversing the Board, the Court found that a basic purpose of the Taft-Hartley Act was to establish a sharp line between management and labor. When the Board breached this line by deeming supervisors to be "employees" within the Act, Congress responded by passing the Taft-Hartley Act with its explicit exclusion of supervisory employees. And when the Board in *Bell Aerospace* departed from its own recognition that "[i]t was the clear intent of Congress to exclude from the coverage of the Act *all individuals allied with management*,"[3] this Court responded by again requiring the Board to adhere to the dividing line between management and labor—a line fundamental to the industrial philosophy of the labor laws in this country.[4]

Indeed, it was to assure that those employees allied with management were not included in the ranks of labor that the Board originally developed the "supervisory," "managerial," and "confidential" employees exclusions from the Wagner Act. The Board recognized that employees who by their duties, knowledge, or sympathy were aligned with management should not be treated as members of labor. In the adversary system which our labor laws envision, neither management nor labor should be forced to accept a potential fifth column into its ranks. Thus, both before and after the Taft-Hartley Act, the Board excluded from bargaining units of the

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[3] *Swift & Co.*, 115 N. L. R. B. 752, 753–754 (1956) (emphasis added).

[4] As Justice Douglas explained in his dissent in *Packard*, *supra*:

"The present decision [by the Court] . . . tends to obliterate the line between management and labor. It lends the sanctions of federal law to unionization at all levels of the industrial hierarchy. It tends to emphasize that the basic opposing forces in industry are not management and labor but the operating group on the one hand and the stockholder and bondholder group on the other. . . . [I]f Congress, when it enacted the National Labor Relations Act, had in mind such a basic change in industrial philosophy, it would have left some clear and unmistakable trace of that purpose. But I find none." 330 U. S., at 494–495.

rank and file, employees who like "expediters" are "closely related to management," *Friez & Sons*, 47 N. L. R. B. 43, 47 (1943), or who like assistant buyers have "interests . . . more closely identified with those of management." *Denver Dry Goods Co.*, 74 N. L. R. B. 1167, 1175 (1947). The Board has excluded employees "who formulate, determine, and effectuate an employer's policies," *AFL–CIO*, 120 N. L. R. B. 969, 973 (1958), and employees who because of their familial relation to management "are on an intimate relationship with officers of the company." *Burke Brewery, Inc.*, 54 N. L. R. B. 1061, 1062, n. 2 (1944).

The "confidential employee" exclusion and the labor nexus which the Board insists upon must be viewed as part of this larger effort to keep the line between management and labor distinct. Certainly employees with knowledge of sensitive labor relations information or "who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations,"[5] fall on the management side of the line and should be excluded from the Act. But useful as it may be in identifying employees who are allied to management, the "labor nexus" test is but a means to this end. By its rigid insistence on the labor nexus in the case of confidential secretaries, the Board, and now this Court, have lost sight of the basic purpose of the labor-nexus test itself and of the fundamental theory of our labor laws. Thus, it makes little sense to exclude "expediters," "assistant buyers," and "employment interviewers" as managerial but include within the rank and file confidential secretaries who are privy to the most sensitive details of management decisionmaking, who work closely with managers on a personal and daily basis, and who occupy a position of trust incompatible with labor-management strife. To include employees so clearly allied to management

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[5] *B. F. Goodrich Co.*, 115 N. L. R. B. 722, 724 (1956).

within the ranks of labor does a disservice to management and labor alike.[6]

II

The Court's decision not only is in conflict with the basic framework of the labor laws, it also conflicts with explicit expressions of congressional intent on this subject. Congress only forbore from including an explicit provision in the Taft-Hartley Act excluding confidential secretaries because of its belief that the Board had been treating, and would continue to treat, such employees as allied to management. In discussing a proposed exclusion for confidential employees, the House Report stated:

> "Most of the people who would qualify as 'confidential' employees are executives and are excluded from the act in any event.
>
> "The Board, itself, normally excludes from bargaining units *confidential clerks and secretaries to such people as these.*" H. R. Rep. No. 245, 80th Cong., 1st Sess., 23 (1947) (emphasis added).

The Conference Report indicated a similar belief:

> "In the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the

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[6] Just as management opposes the creation of conflicts of loyalty within its midst, neither does labor wish to represent employees who are allied to management. Thus, in *Montgomery Ward & Co.*, 36 N. L. R. B. 69, 73 (1941), for example, it was the union that sought to exclude confidential secretaries to store managers from the bargaining unit. See, *e. g.*, *Stroock & Stroock & Lavan*, 253 N. L. R. B. 447–448 (1980) ("the Employer argues the secretaries to the firm's executive committee are not confidential employees and should be included in the unit. The [union] counters that the Employer must have some confidential employees . . ."); *E. P. Dutton & Co.*, 33 N. L. R. B. 761, 766 (1941) ("Among the employees whom the Guild would exclude as confidential are three secretaries to officers of the Company").

> House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. *This is the prevailing Board practice with respect to such people as confidential secretaries as well*, and it was not the intention of the conferees to alter this practice in any respect." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947) (emphasis added).

It was in light of these statements in the legislative history that we felt confident in *Bell Aerospace* that "'Congress could not have supposed that, while "confidential secretaries" could not be organized, their bosses could be.'" 416 U. S., at 284, quoting *Bell Aerospace Co.* v. *NLRB*, 475 F. 2d 485, 491–492 (CA2 1973).

The Court's opinion argues that the foregoing explicit legislative history is to be ignored because the express exclusion in the House bill of confidential secretaries was omitted in Conference. But it is clear from the language in the Reports italicized above that the omission was prompted by an understanding that the Board itself consistently had excluded "such people as confidential secretaries."[7] Indeed,

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[7] This understanding was not without support in the case law. In *E. P. Dutton & Co.*, *supra*, the Board excluded secretaries to officers of the company from the bargaining unit of clerical employees without any mention of a labor nexus. The Board took notice of the fact that "'[t]he nature of a personal secretary's work is such that much of the *confidential material pertaining to the management* passes through his or her hands. . . . [M]anagement should not be required to handle such material through employees in the unit represented by the union with which it is dealing.'" *Id.*, at 766–767, n. 8, quoting *Brooklyn Daily Eagle*, 13 N. L. R. B. 974, 986 (1939) (emphasis added). The Board expressed its belief that "private secretaries should be excluded where . . . [the union] . . . is of the opinion that *the personal and confidential relationship* existing between the private secretaries . . . and the Company's officers is such as to create a possible division of their loyalties between the management and the potential bargaining agent." 33 N. L. R. B., at 766–767, n. 8 (emphasis added). See also *Montgomery Ward & Co.*, *supra* (secretaries of store managers excluded without reference to labor nexus).

the Members of Congress had no reason to believe that it could be argued seriously that confidential secretaries to management officials were not among the "individuals allied with management." *Swift & Co.*, 115 N. L. R. B. 752, 754 (1956). The "labor nexus," as increasingly narrowed by the Board and now accepted by this Court, is antithetical to any common-sense view or understanding of the role of confidential secretaries.

III

Just as I would reject the Board's adherence to the labor-nexus test in the case of confidential secretaries, so, too, I would reject the Board's position that confidential employees are not excluded from the Act as a whole but only from collective bargaining. The Board urges the Court to hold that even if the secretary in this litigation was conceded to be a confidential employee, indeed, *even if she had a labor nexus*, the company still could not have dismissed her without incurring liability under the Act.

The Court wisely declines the Board's invitation. See, *ante*, at 186, n. 19. Such a holding would be a major departure from the basic philosophy of the Act. See *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485 (1947). Under such an interpretation confidential employees *with* a labor nexus might do anything in furtherance of their allegiance to labor except join the union, and the company would be powerless to protect itself. Confidential employees might join picket lines, sign petitions advocating the cause of labor, speak out against management at employee meetings, and engage in all manner of concerted activity. Even in the midst of labor-management strife, the confidential secretaries to the top managers of the company, with daily access to the company's bargaining positions, might convey confidential information as to these positions to the union, as well as take their place on the picket lines. The company would be unable to dismiss them or demote them, at least without the risk of an unfair

labor practice charge being filed. The Board developed the labor-nexus test because it recognized that "management should not be required to handle labor relations matters through employees who are represented by the union." *Hoover Co.*, 55 N. L. R. B. 1321, 1323 (1944). Neither should management be required to expose its flank to confidential employees who are overtly committed to the union or the cause of labor in all but actual membership.

The legislative history of the Act contains no support whatever for the Board's position. To the contrary, the Congress repeatedly stated its belief that in addition to supervisors certain other employees would be excluded from the Act. Thus, the Conference Report stated that "[i]n the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provision . . . since the Board has treated, and presumably will continue to treat, such persons *as outside the scope of the act.*" H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947) (emphasis added). In a generally similar context in *NLRB* v. *Bell Aerospace Co.*, 416 U. S., at 283, we said: "The legislative history strongly suggests that there also were other employees, much higher in the managerial structure, who were likewise regarded *as so clearly outside the Act* that no specific exclusionary provision was thought necessary" (emphasis added). As the majority's discussion of the legislative history indicates, the Congress viewed the confidential and managerial exemptions as akin to the supervisory exclusion. Congress considered that confidential and managerial employees, like supervisors, would be entirely excluded from the Act.

In *Bell Aerospace*, *supra*, at 289, we held that "'managerial employees' are not covered by the Act." The majority accepts this holding. See *ante*, at 187. Yet if managerial employees are excluded from the Act in its entirety I see no principled reason why confidential employees with a labor nexus should be treated differently.

I would reject the Board's seeming "half-a-loaf" approach to the confidential employee exclusion.[8] As Judge Craven explained for the Fourth Circuit:

> "It strikes us as nonsense for the Board to exclude [a confidential secretary] from membership in the bargaining unit *and then* extend to her the same protection for the same concerted activity that she would have enjoyed if a union member. If [a confidential secretary] is committed to the union cause to the extent she joins the strike by refusing to cross the picket line, it would seem to matter little to the company that she is not technically a union member. A confidential secretary who plights her troth with the union differs in form, but not in substance, from one who holds a union card. Since she cannot formally join the unit, there is nothing incongruous in holding that she cannot 'plight her troth' with the unit. Indeed, it seems more consistent to say that if she cannot act in concert by participating in the unit, then she cannot act in concert on an informal basis, or more accurately, that if she does so, it will be without the protection of the Act." *NLRB* v. *Wheeling Electric Co.*, 444 F. 2d 783, 788 (1971).

Accord, *Peerless of America, Inc.* v. *NLRB*, 484 F. 2d 1108, 1112 (CA7 1973). But see *NLRB* v. *Southern Greyhound Lines*, 426 F. 2d 1299 (CA5 1970) (assuming without discussion that confidential employees are not excluded from the Act in its entirety).

IV

After today's decision, labor must accept into its ranks confidential secretaries who are properly allied to management.

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[8] Of course there are limits to the power of management over its confidential employees just as there are limits to its power over its supervisory employees. See, *e. g.*, *NLRB* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209 (CA5 1954).

And these confidential employees, who are privy to the daily affairs of management, who have access to confidential information, and who are essential to management's operation may be subjected to conflicts of loyalty when the essence of their working relationship requires undivided loyalty. The basic philosophy of the labor relations laws, the expressed intent of Congress, and the joint desire of labor and management for undivided loyalty all counsel against such a result.

RALSTON, WARDEN *v.* ROBINSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80–2049. Argued October 5, 1981—Decided December 2, 1981

Respondent, when 17 years old, pleaded guilty to second-degree murder and was sentenced to 10 years' imprisonment under the Federal Youth Corrections Act (YCA), 18 U. S. C. § 5010(c). Subsequently, while incarcerated, he was found guilty of assaulting a federal officer, and the District Court imposed an adult sentence to be served consecutively to the YCA sentence, finding that respondent would not benefit from any further treatment under the YCA. Later, while still incarcerated, respondent pleaded guilty to another charge of assaulting a federal officer, and the District Court sentenced him to a further adult sentence to be served consecutively to the sentence he was then serving. The Bureau of Prisons then classified respondent as an adult offender, and accordingly, since that time, he has not been segregated from adult prisoners and has not been offered the YCA rehabilitative treatment that the initial trial court recommended. After exhausting his administrative remedies, respondent filed a petition for habeas corpus. The District Court granted the writ, and the Court of Appeals affirmed, holding that the YCA forbids the reevaluation of a YCA sentence by a second judge, even if the second judge makes a finding that further YCA treatment would not benefit the offender.

Held: The YCA does not require YCA treatment for the remainder of a youth sentence where the judge imposing the subsequent adult sentence determines, as here, that such treatment will not benefit the offender further. Pp. 206–220.

(a) The YCA strongly endorses a judge's discretionary power to choose among available sentencing options, and prescribes certain basic conditions of treatment for YCA offenders. By determining that the youth offender should be sentenced under the YCA, the trial court in effect decides that the Bureau of Prisons must comply with both the segregation and treatment requirements of the statute. Correctional authorities may not exercise any of the sentencing powers established in the YCA. Pp. 206–210.

(b) The language of § 5010(c) authorizing a court to "sentence the youth offender to the custody of the Attorney General for treatment and supervision" pursuant to the YCA, and of § 5011 providing that "[c]om-

mitted youth offenders . . . *shall undergo treatment* in institutions . . . that will provide the essential varieties of treatment" and that "*such youth offenders shall be segregated from other offenders*," does not prohibit any modification of the basic terms of a YCA sentence before its expiration. That is, such language does not require the judge to make an *irrevocable* determination of segregation or treatment needs, nor preclude a subsequent judge from redetermining those needs in light of intervening events. Pp. 210–211.

(c) On the other hand, the YCA does not give the Bureau of Prisons independent authority to deny a youth offender the treatment and segregation from adults that a sentencing court mandates. Pp. 211–213.

(d) The purposes of the YCA, as revealed in its structure and legislative history, compel the conclusion that a court faced with a choice of sentences for a youth offender still serving a YCA term is not deprived of the option of finding no further benefit in YCA treatment for the remainder of the term. Such history and structure also demonstrate Congress' intent that a court—but not prison officials—may require a youth offender to serve the remainder of a YCA sentence as an adult after the offender has received a consecutive adult term. When Congress withdrew from prison officials some of their traditional authority to adjust conditions of confinement, it could not have intended that no one exercise that authority, the only reasonable conclusion being that Congress reposed that authority in the court. Pp. 213–217.

(e) The standards that a district judge should apply in determining whether an offender will obtain any *further* benefit from YCA treatment are no different from the standards applied in imposing the sentence originally. In light of all relevant factors, the judge can exercise his sound discretion in determining whether the offender should receive youth or adult treatment for the remainder of his term, and should make a judgment informed by both the YCA's rehabilitative purposes and the offender's realistic circumstances. Here, the second sentencing judge made a sufficient finding that respondent would not benefit from YCA treatment during the remainder of his youth term. Pp. 218–219.

642 F. 2d 1077, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, *post*, p. 221. STEVENS, J., filed a dissenting opinion, in which BRENNAN and O'CONNOR, JJ., joined, *post*, p. 223.

David A. Strauss argued the cause *pro hac vice* for petitioner. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Frey,* and *William G. Otis.*

Jerold S. Solovy, by appointment of the Court, 453 U. S. 921, argued the cause and filed a brief for respondent.

JUSTICE MARSHALL delivered the opinion of the Court.

We granted certiorari in this case, 452 U. S. 960 (1981), to decide whether a youth offender who is sentenced to a consecutive adult term of imprisonment while serving a sentence imposed under the Federal Youth Corrections Act (YCA), 18 U. S. C. § 5005 *et seq.*, must receive YCA treatment for the remainder of his youth sentence. The Courts of Appeals are in conflict on this issue.[1] We conclude that the YCA does not require such treatment if the judge imposing the subsequent adult sentence determines that the youth will not benefit from further YCA treatment during the remainder of his youth sentence. Accordingly, we reverse the judgment of the Court of Appeals.

I

In 1974 respondent, who was 17 years old, pleaded guilty to a charge of second-degree murder and was sentenced to a 10-year term of imprisonment under the YCA, § 5010(c). The sentencing judge recommended that he be placed at the

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[1] In this case, the United States Court of Appeals for the Seventh Circuit gave an affirmative answer to the question presented. See 642 F. 2d 1077 (1981). The United States Court of Appeals for the Third Circuit, *Thompson* v. *Carlson*, 624 F. 2d 415 (1980), gave a negative answer, holding that a judge's determination that the offender would not benefit from YCA treatment warrants treating him immediately as an adult. The United States Court of Appeals for the Fourth Circuit, *Outing* v. *Bell*, 632 F. 2d 1144 (1980), cert. denied *sub nom. Outing* v. *Smith*, 450 U. S. 1001 (1981), also gave a negative answer, holding that the policy of prison officials warrants treating him as an adult.

Kennedy Youth Center in Morgantown, W. Va.; that he not be released until he had attained at least an eighth-grade level of education and had successfully completed a trade of his own choosing; and that he participate in intensive, individual therapy on a weekly basis and undergo a complete psychological reevaluation before being returned to the community. The sentence, like all YCA sentences, contemplated that the respondent be segregated from adult offenders. See 18 U. S. C. § 5011.

Respondent's subsequent conduct has not been exemplary. In 1975, while incarcerated at the Federal Correctional Institution (FCI) at Ashland, Ky., respondent was found guilty of assaulting a federal officer by use of a dangerous weapon, in violation of 18 U. S. C. §§ 111 and 1114. The United States District Court for the Eastern District of Kentucky imposed an additional 10-year adult sentence and stated in its commitment order: "The Court finds that the defendant will not benefit any further under the provisions of the [YCA] and declines to sentence under said act." After receiving a presentence report, the judge reduced the sentence to 66 months, to be served consecutively to the YCA sentence. The judge also recommended that respondent be transferred from the Kentucky institution "to a facility providing greater security."

Respondent was placed in the Federal Correctional Institution at Oxford, Wis. Subsequent disciplinary problems resulted in his transfer to the FCI at Lompoc, Cal. In 1977, while confined in that institution, respondent pleaded guilty to another charge of assaulting a federal officer. The United States District Court for the Central District of California sentenced him under 18 U. S. C. § 5010(d) to an adult sentence of one year and one day and ordered that the sentence run consecutive to and not concurrent with the sentence that respondent was then serving.

After the second adult sentence, the Bureau of Prisons classified respondent as an adult offender. Accordingly, at

least since that time,[2] respondent has not been segregated from the adult prisoners, and has not been offered the YCA rehabilitative treatment that the initial trial court recommended. The Bureau of Prisons acted pursuant to a written policy when it classified respondent as an adult. In implementing the YCA's treatment and segregation requirements, the Bureau narrowly defines a "YCA Inmate" as "any inmate sentenced under 18 USC Section 5010(b), (c), or (e) *who is not also sentenced to a concurrent or consecutive adult term*, whether state or federal." Bureau of Prisons Policy Statement No. 5215.2, p. 1 (Dec. 12, 1978) (emphasis added).

Respondent exhausted his administrative remedies and filed a petition for habeas corpus on May 25, 1978. The Magistrate recommended transfer to an institution in which respondent would be segregated from adults and would receive YCA treatment. The United States District Court for the Southern District of Illinois issued an order granting the writ, which was affirmed by the United States Court of Appeals for the Seventh Circuit. 642 F. 2d 1077 (1981). The Court of Appeals held that the YCA forbids the reevaluation of a YCA sentence by a second judge, even if the second judge makes an explicit finding that further YCA treatment would not benefit the offender. The Court of Appeals also rejected petitioner's broader argument that the YCA vests discretion in the Bureau of Prisons to modify the treatment terms of a YCA sentence when the offender has received a consecutive or concurrent adult sentence for a felony.

On January 9, 1982, respondent will be conditionally released from his YCA sentence and will begin his first adult sentence.

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[2] Respondent asserts that he has never been segregated from non-YCA prisoners nor received special YCA treatment. Although petitioner disputes this assertion, the record of frequent transfers lends some credence to respondent's claim. Given our disposition of this case, we need not address this issue.

II

In *Dorszynski* v. *United States*, 418 U. S. 424 (1974), this Court exhaustively analyzed the history, structure, and underlying policies of the YCA. From that analysis, and from the language of the YCA, two relevant principles emerge. First, the YCA strongly endorses the discretionary power of a judge to choose among available sentencing options. Second, the YCA prescribes certain basic conditions of treatment for YCA offenders.

In *Dorszynski*, THE CHIEF JUSTICE, writing for the Court, found that the principal purpose of the YCA is to rehabilitate persons who, because of their youth, are unusually vulnerable to the danger of recidivism:

> "To accomplish this objective, federal district judges were given two new alternatives to add to the array of sentencing options previously available to them . . . : first, they were enabled to commit an eligible offender to the custody of the Attorney General for treatment under the Act. 18 U. S. C. §§ 5010(b) and (c). Second, if they believed an offender did not need commitment, they were authorized to place him on probation under the Act. 18 U. S. C. § 5010(a). If the sentencing court chose the first alternative, the youth offender would be committed to the program of treatment created by the Act." *Id.*, at 433.[3]

If a court wishes to sentence a youth to an adult sentence, it is authorized to do so under § 5010(d). In *Dorszynski*, a

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[3] Under § 5010(b) and § 5017(c), a court is authorized to sentence an offender to an indeterminate YCA term of six years, even if the adult maximum sentence would be a lesser term. Under § 5010(c) and § 5017(d), if a court finds that the offender may not be able to derive maximum benefit from YCA treatment within six years, it may impose a YCA term of any length authorized by law for the crimes of which the offender is convicted. Respondent was initially sentenced under the latter provisions to a 10-year term; the maximum adult penalty for his crime (second-degree murder) was life imprisonment.

majority of this Court held that a judge must make an explicit "no benefit" finding to invoke this subsection, but need not give a statement of reasons to justify his decision. Both the majority and concurring opinions emphasized that the YCA was not intended to disturb the broad discretion traditionally available to federal judges in choosing among appropriate sentences. 418 U. S., at 436–442; *id.*, at 450 (MARSHALL, J., with whom Douglas, BRENNAN, and Stewart, JJ., joined, concurring in judgment).

We reiterated that trial courts retain significant control over sentencing options in *Durst* v. *United States*, 434 U. S. 542 (1978), where we unanimously held that the YCA permits the court to impose a fine or require restitution when it places a youth on probation under § 5010(a). In his opinion for the Court, JUSTICE BRENNAN explained the underlying purposes of the Act:

> "The core concept of the YCA, like that of England's Borstal System upon which it is modeled, is that rehabilitative treatment should be substituted for retribution as a sentencing goal. Both the Borstal System and the YCA incorporate three features thought essential to the operation of a successful rehabilitative treatment program: flexibility in choosing among a variety of treatment settings and programs tailored to individual needs; separation of youth offenders from hardened criminals; and careful and flexible control of the duration of commitment and of supervised release." *Id.*, at 545–546 (footnotes omitted).

A second important feature of the YCA is that it empowers, and indeed requires, a judge to prescribe certain basic conditions of YCA treatment. This prescription ensures that treatable youth offenders are segregated from adult criminals, and that they receive appropriate rehabilitative care.

The need to segregate youth from adult criminals drew special attention in the legislative history. Proponents of

the statute criticized the practice of "herding youth with maturity, the novice with the sophisticate, the impressionable with the hardened, and . . . subjecting youth offenders to the evil influences of older criminals and their teaching of criminal techniques . . . ." H. R. Rep. No. 2979, 81st Cong., 2d Sess., 2–3 (1950); see 96 Cong. Rec. 15036 (1950). This concern was expressed in the statutory requirement that offenders receiving youth sentences be segregated from adults. 18 U. S. C. § 5011.[4] More generally, "[t]he panoply of treatment options available under the Act is but further evidence that the YCA program was intended to be sufficiently comprehensive to deal with all but the 'incorrigible' youth." *Dorszynski*, *supra*, at 449 (MARSHALL, J., concurring in judgment) (footnote omitted).

The YCA allocates responsibility for determining essential treatment conditions in an unusual way. Under traditional sentencing statutes, prison officials exercise almost unlimited discretion in imposing the security and treatment conditions that they believe appropriate. The YCA is different. By determining that the youth offender should be sentenced under the YCA, the trial court in effect decides two essential conditions of confinement: the Bureau of Prisons must comply with both the segregation and treatment requirements of the

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[4] Section 5011 provides in full:

"Committed youth offenders not conditionally released shall undergo treatment in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varieties of treatment. The Director shall from time to time designate, set aside, and adapt institutions and agencies under the control of the Department of Justice for treatment. Insofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment."

YCA. 18 U. S. C. § 5011. See *Brown* v. *Carlson*, 431 F. Supp. 755, 765 (WD Wis. 1977); Hearings on S. 1114 and S. 2609 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st Sess., 43–44 (1949) (statement of Judge Parker) (hereinafter 1949 Senate Hearings); Report to the Judicial Conference of the Committee on Punishment for Crime 8–9 (1942). The Bureau retains significant discretion in determining the conditions of confinement, see *infra*, at 211, but its discretion is limited by these requirements.

The history of the YCA's passage buttresses the conclusion that correctional authorities may not exercise any of the sentencing powers established in the Act:

> "The initial legislative proposal, an American Law Institute model Act, removed the power to sentence eligible offenders from the trial judges altogether and reposed that power in a correctional authority. Not surprisingly, that proposal brought swift and sharp criticism from the judges whose power was to be sharply curtailed. The next proposal, by the Judicial Conference, involved shared sentencing powers between trial judges and correctional authorities. It met with similar criticism. The 1949 proposal, which was finally enacted into law, retained sentencing power in the trial judge." *Dorszynski*, 418 U. S., at 446–447 (MARSHALL, J., with whom Douglas, BRENNAN, and Stewart, JJ., joined, concurring in judgment) (footnotes omitted).

This unusual responsibility for treatment conditions demands that the sentencing judge thoroughly understand all available facts relevant to the offender's treatment needs. Thus, the statute provides the trial court with the opportunity to obtain an extremely comprehensive presentence report, 18 U. S. C. § 5010(e). See S. Rep. No. 1180, 81st Cong., 1st Sess., 5 (1949); 1949 Senate Hearings, at 18–19 (statement of Chief Judge Laws); Hearings on H. R. 2139 and

H. R. 2140 Before Subcommittee No. 3 of the House Committee on the Judiciary, 78th Cong., 1st Sess., 63–64 (1943) (statement of Judge Laws). With this framework in mind, we will review the parties' statutory arguments.

III

Respondent asserts that the express language of the YCA prohibits any modification of the basic terms of a YCA sentence before its expiration. Respondent first points to § 5010(c), which authorizes a court to "sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period [beyond six years] that may be authorized by law for the offense . . . or until discharged by the [United States Parole] Commission." Respondent also relies on § 5011, which provides that "[c]ommitted youth offenders . . . *shall undergo treatment* in institutions . . . that will provide the essential varieties of treatment," and that "[i]nsofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, *and such youth offenders shall be segregated from other offenders*, and classes of committed youth offenders shall be segregated according to their needs for treatment" (emphasis added). From this language, respondent argues that the essential segregation and treatment requirements of the initial YCA sentence cannot be modified before the sentence expires.

We are not persuaded by this interpretation. Section 5010 enables the sentencing court to determine whether a youth offender would benefit from treatment under the YCA. If the original sentencing court determines that such treatment would be beneficial, it may sentence the youth offender under § 5010(a), (b), or (c), or it may request additional information under § 5010(e). Once the original sentencing court has made this determination and has sentenced the offender under the YCA, § 5011 requires the Bureau of Prisons to carry out the mandate of the court with respect to the offend-

er's segregation and treatment needs. We do not read that language as requiring the judge to make an *irrevocable* determination of segregation or treatment needs, or as precluding a subsequent judge from redetermining those needs in light of intervening events.

At the other extreme, petitioner asserts that the YCA gives the Bureau of Prisons independent statutory authority to determine that a YCA offender will not benefit from YCA treatment. Petitioner believes that the Bureau can make such a determination at any time, whether or not an offender has committed a subsequent offense. We reject this extraordinarily broad interpretation, and any interpretation that would grant the Bureau independent authority to deny an offender the treatment and segregation from adults that a sentencing court mandates.

Prison officials do have a significant degree of discretionary authority under the YCA relevant to the treatment of youth offenders. The Bureau is responsible for studying the treatment needs of committed youth offenders, 18 U. S. C. § 5014, and for confining offenders and affording treatment "under such conditions as [the Director of the Bureau] believes best designed for the protection of the public." 18 U. S. C. § 5015(a)(3). It may commit or transfer offenders to any appropriate agency or institution, 18 U. S. C. §§ 5015(a)(2) and (b), and may provide treatment in a wide variety of institutional settings. 18 U. S. C. § 5011. Moreover, it has authority to recommend conditional release and otherwise to consult with the United States Parole Commission in the implementation of the YCA. 18 U. S. C. §§ 5014, 5015(a)(1), 5016, 5017.

However, the statute does not give the Bureau any discretion to modify the *basic* terms of treatment that a judge imposes under §§ 5010 and 5011. When a judge imposes a youth sentence under the YCA, the sentence commits the

youth to the custody of the Attorney General "for treatment and supervision pursuant to this chapter." 18 U. S. C. §§ 5010(b) and (c). Section 5011 provides two elements of mandatory treatment: first, youths must undergo treatment in an appropriate institution that will "provide the essential varieties of treatment"; second, "[i]nsofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment." These two elements of the program are statutorily mandated, and the discretion of the Bureau is limited to the flexible discharge of its responsibilities *within* these two broad constraints.[5]

Even if the Bureau asserted only the right to treat YCA offenders as adults in accordance with its Policy Statement, see *supra*, at 205, this assertion of power is much too broad. The policy would treat *any* youth offender with an adult con-

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[5] Although the Courts of Appeals consistently have rejected the argument that the Bureau of Prisons may ignore the obligations under § 5011, they have not agreed on the degree of the flexibility the Bureau possesses in complying with the segregation requirement. This conflict arises from the requirement in § 5011 that certain obligations be discharged "[i]nsofar as practical." See n. 4, *supra*. See, *e. g.*, *Watts* v. *Hadden*, 651 F. 2d 1354 (CA10 1981); *Outing* v. *Bell*, 632 F. 2d 1144 (CA4 1980), cert. denied *sub nom. Outing* v. *Smith*, 450 U. S. 1001 (1981); *United States ex rel. Dancy* v. *Arnold*, 572 F. 2d 107 (CA3 1978); *Harvin* v. *United States*, 144 U. S. App. D. C. 199, 445 F. 2d 675 (en banc), cert. denied, 404 U. S. 943 (1971); *Brown* v. *Carlson*, 431 F. Supp. 755 (WD Wis. 1977); *Johnson* v. *Bell*, 487 F. Supp. 977 (ED Mich. 1980).

We need not address the issue of the scope of the practicality exception in this case because petitioner's reliance on it is misplaced. Petitioner argues that because some "hardened" youths may be serving YCA sentences, it is "impractical" to segregate them from adults. The sentencing courts, however, determined that these "hardened" youths would benefit from YCA treatment and consequently should be segregated from adults and integrated with other youth offenders. Petitioner really questions the wisdom, not the practicality, of that determination.

secutive sentence as an adult—even if 15 years of his YCA sentence remained and the adult sentence were only for 1 year. It is unreasonable, indeed callous, to assume that such an offender could not receive any further benefit from YCA treatment. This example underscores the importance of leaving such decisions to the sound discretion of a federal sentencing judge, rather than to prison officials. The fatal defect in petitioner's argument is that it permits prison officials to make a determination—whether a YCA offender will benefit from YCA treatment—that the statute commits to the sentencing judge.

IV

No provision of the YCA explicitly governs the issue before us. The statute describes the sentencing options available to a judge after conviction but does not elucidate what options would be available after the defendant has been convicted of a second crime while serving his initial sentence. The purposes of the statute, however, revealed in its structure and legislative history, compel the conclusion that a court faced with a choice of sentences for a youth offender still serving a YCA term is not deprived of the option of finding no further benefit in YCA treatment for the remainder of the term.

Under § 5010(d), a court sentencing an offender who is serving a youth term may make a "no benefit" finding and then "sentence the youth offender under any other applicable penalty provision." A judge is thus authorized to impose a consecutive adult term, as the second judge did in this case. However, the court also has before it the question whether the offender will benefit from YCA treatment during the remainder of the YCA term. Although § 5010(d) does not expressly authorize a second judge to make a "no benefit" finding with respect to the remainder of an unexpired YCA sentence, we believe that it implicitly authorizes such a determination, as well as the determination that YCA treat-

ment during the consecutive sentence would not be beneficial. It assuredly does *not* authorize prison officials to make either determination.

Our review of the legislative history reveals no explicit discussion of the trial court's options in sentencing a youth who commits a crime while serving a YCA sentence; Congress apparently did not consider this specific problem. But Congress did understand that the original treatment imposed by the sentencing judge might fail, and that protective as well as rehabilitative purposes might justify a lengthy confinement under § 5010(c). In commenting on that section, the House Report states: "This affords opportunity for the sentencing court to avail itself of the provisions of this bill and at the same time insure protection of the public if efforts at rehabilitation fail." H. R. Rep. No. 2979, 81st Cong., 2d Sess., 4 (1950).[6]

The history and structure of the YCA discussed above, *supra*, at 206–210, demonstrate Congress' intent that a court—but not prison officials—may require a youth offender to serve the remainder of a YCA sentence as an adult after the offender has received a consecutive adult term. First, the YCA prescribes certain basic elements of treatment, segregation from adults and individualized rehabilitative programs, as part of a YCA sentence. Second, sponsors of the Act repeatedly stated that its purpose was to prevent youths from becoming recidivists, and to insulate them from the insidious influence of more experienced adult criminals. Housing incorrigible youths with youths who show promise of rehabilitation would not serve this purpose. Third, the

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[6] The same explanation was offered at the Senate hearings by the Chairman of the Committee that drafted the bill. 1949 Senate Hearings, at 62 (statement of Chief Judge Phillips). See also *id.*, at 13 (statement of Chief Judge Laws) (section is to be used "if the judge feels that a youth offender convicted of an offense calling for a long term under existing statutes might not respond to treatment within 6 years or that so short a term might have an adverse effect on enforcement of the law . . .").

decision whether to employ the unique treatment methods of the YCA is exclusively committed to the discretion of the sentencing judge, rather than to prison officials. If segregation of a particular class of youths from adults would be futile, that is a decision to be made by a court, not by prison authorities.

Finally, in light of the above, we do not believe that when Congress withdrew from prison officials some of their traditional authority to adjust the conditions of confinement over time, Congress intended that no one exercise that authority. The result would be an inflexible rule requiring, in many cases, the continuation of futile YCA treatment. The only reasonable conclusion is that Congress reposed that authority in the court, the institution that the YCA explicitly invests with the discretion to make the original decision about basic treatment conditions.

We find further support for this conclusion from the fact that, in several circumstances, the YCA permits a youth offender initially sentenced under the YCA to be treated as an adult for what would otherwise be the remainder of the YCA sentence.[7] For example, the statute permits a court to sentence a defendant to an adult term if he commits an adult offense after receiving a suspended sentence and probation under § 5010(a).[8] If respondent had been sentenced initially

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[7] In other circumstances, the YCA contemplates reevaluation of the initial sentence—a judge may *reduce* the severity of the terms of commitment in light of changed circumstances. The YCA does not disturb "the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation." 18 U. S. C. § 5023. The YCA also permits a court to unconditionally discharge a youth on probation prior to the expiration of the probationary period and to issue a certificate to that effect. 18 U. S. C. § 5021. See *Thompson* v. *Carlson*, 624 F. 2d, at 421.

[8] By virtue of § 5023(a), the YCA incorporates 18 U. S. C. § 3653. Under the latter section, if a court has suspended the imposition of sentence and placed an offender on probation, the court, after revoking probation, may impose any sentence that it might have imposed originally. See

to probation under § 5010(a) and had been subsequently convicted of criminal assault, the court could have imposed an adult sentence for the original crime, for the assault, or for both, to begin immediately. In fact, respondent committed his second crime while incarcerated. It hardly seems logical to prohibit an immediate modification of respondent's treatment conditions simply because he originally received the harsher sentence of YCA incarceration.

Moreover, respondent concedes that the statute permits a judge to impose a *concurrent* adult sentence on an offender who is serving a YCA term.[9] Such an adult sentence would

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generally *Durst* v. *United States*, 434 U. S. 542, 551 (1978) (§ 5023(a) "preserve[s] to sentencing judges their powers under the general probation statute when sentencing youth offenders to probation under § 5010(a)"). Section 5010(a) also authorizes the court to impose a YCA sentence but suspend its execution. If such an offender commits a crime while on probation, the court may require him to begin serving the YCA sentence immediately, or the court may impose an adult sentence for the second crime.

[9] We have no doubt that the second sentencing judge could have modified respondent's YCA treatment terms by imposing a concurrent sentence. The judge did not, however, avail himself of that option.

It would be anomalous to permit a concurrent sentence to modify the terms of the remainder of a YCA sentence but not to permit a consecutive term to have that effect, since a concurrent sentence is traditionally imposed as a *less* severe sanction than a consecutive sentence. See National Advisory Commission on Criminal Standards and Goals, Sentencing Standard 5.6 (1973); A. Campbell, Law of Sentencing § 76 (1978). Moreover, a consecutive sentence may be the preferable form of sentence for an offense committed while serving a sentence for a prior offense. See U. S. Dept. of Justice, Uniform Law Commissioners' Model Sentencing and Corrections Act § 3–107(c) (1979).

We see no relevant difference in the fact that concurrent sentences traditionally take effect immediately. As we hold today, a judge imposing a *consecutive* adult sentence may find that continued YCA treatment during the unexpired term would be futile, and his finding may take effect immediately. In either case, the YCA permits a judge to effectuate his finding with respect to whether future YCA treatment would be beneficial. Of course, a concurrent sentence of a given length will result in a shorter ultimate sentence than a consecutive sentence of that length; but a judge wish-

commence at the time that it was imposed and would modify the YCA treatment that the offender would otherwise receive for the remainder of his term. Finally, every offender sentenced under the YCA *must* be released conditionally two years prior to the termination of his sentence. 18 U. S. C. § 5017. However, if the offender violates the terms of this conditional release by committing a crime, the conditional release may be revoked and an adult sentence may immediately be imposed, notwithstanding the fact that the youth sentence has not yet expired. Respondent concedes as much, since he does not challenge the commencement of his adult term in January 1982, even though two years of his youth sentence will still remain.

We therefore conclude that a judge who sentences a youth offender to a consecutive adult term may require that the offender also serve the remainder of his youth sentence as an adult. Only this interpretation can give meaning to both the language and the underlying purposes of the YCA. "[W]e cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate." *FTC* v. *Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968). Accordingly, we hold that a judge may modify the essential terms of treatment of a continuing YCA sentence if he finds that such treatment would not benefit the offender further.[10]

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ing to impose a longer ultimate sentence may simply increase the length of the concurrent sentence accordingly.

[10] The unusual characteristics of a YCA sentence answer respondent's complaint that a second judge cannot "revoke" the original sentence. To be sure, a judge's sentence is traditionally left undisturbed, even when subsequent events indicate that the original sentence was unduly lenient. Such a sentence cannot be "revoked," *i. e.*, a second judge cannot increase its length. On the other hand, tradition has vested wide discretion in prison officials to tailor conditions of confinement to the security requirements and treatment needs of the offender. A prison official's modification of such conditions because of an offender's misconduct would not be

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The standards that a district judge should apply in determining whether an offender will obtain any *further* benefit from YCA treatment are no different from the standards applied in imposing a sentence originally. Of course, the judge should consider the fact that the offender has been convicted of another crime. In light of all relevant factors, the court can exercise its sound discretion in determining whether the offender should receive youth or adult treatment for the re-

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considered a "revocation" of the initial sentence. It is simply an appropriate recognition of the offender's changed circumstances. We think that a judge's modification is no different as a matter of policy. For the same reasons, we do not think that the second judge's modification of the conditions of the YCA sentence in light of the offender's changed circumstances is an impermissible review of the first judge's discretionary decision.

The dissenting opinion asserts that our interpretation of congressional intent is inconsistent with the common-law rule that "'a punishment already partly suffered be not increased.'" *Post*, at 223. That common-law rule simply does not apply when Congress has provided a court with the power to modify a sentence in light of changed circumstances. For example, a court may impose a suspended sentence and probation, under the general probation statute or under the YCA. 18 U. S. C. § 3651 *et seq.*, § 5010. If the defendant violates the terms of his probation, the court may "increase" the punishment by requiring him to serve the initial sentence. Here, the statute permits a judge to modify the conditions of a YCA sentence if the offender is convicted of a subsequent adult crime and if further YCA treatment would be futile. In each case, the sentencing statute invests the court with the power to modify conditions in light of the subsequent offense.

The dissent reviews selective portions of the legislative history but never addresses a critical point. When Congress decided to invest the court with unusual authority over treatment conditions and to deny such authority to prison officials, it did not intend that no institution would have the authority to modify treatment conditions which become futile over time. JUSTICE STEVENS candidly admits that the interpretation he recommends may not "serve any useful purpose for this particular offender." *Post*, at 233–234. We do not believe that Congress was so shortsighted. In examining the sentencing options that the YCA grants to federal judges, we refuse to close our eyes to Congress' unmistakable rehabilitative intent.

mainder of his term. The court need not adopt a rigid rule of the type urged by petitioner. Rather, it should make a judgment informed by both the rehabilitative purposes of the YCA and the realistic circumstances of the offender.

Applying these principles to the facts before us, we conclude that the second sentencing judge made a sufficient finding that respondent would not benefit from YCA treatment during the remainder of his youth term.[11] The judge found that respondent would not benefit "further" under the YCA, and he declined to impose a youth sentence under that Act, imposing instead a consecutive adult sentence.[12] In the future, we expect that judges will eliminate interpretive difficulties by making an explicit "no benefit" finding with respect to the remainder of the YCA sentence.[13]

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[11] Apparently, the Court of Appeals believed that a rehabilitative purpose may have existed here. However, given the facts of this case, any such belief is sheer speculation. After all, the second judge found that respondent would not benefit "further" from YCA treatment. In future cases, we emphasize, the sentencing judge has the responsibility for determining whether an offender would derive any rehabilitative benefit from receiving continued YCA treatment prior to serving an adult sentence.

[12] The judge's recommendation that respondent be transferred "to a facility providing greater security" is additional evidence that the judge did not believe that respondent would derive further benefit from YCA treatment.

[13] We need not address the question whether a judge may modify the basic treatment terms of a youth sentence whose length exceeds the maximum penalty authorized by law for an adult, since respondent's YCA sentence was imposed under § 5010(c), not § 5010(b). We recognize that if the basic treatment elements of a YCA sentence under § 5010(b) are modified at such a time that a youth effectively serves an adult sentence of greater length than an adult could receive, there would be a serious issue whether such a sentence is authorized by any statute and, if so, whether it violates the Equal Protection Clause. Cf. *Carter* v. *United States*, 113 U. S. App. D. C. 123, 125, 306 F. 2d 283, 285 (1962) (longer term under YCA constitutional, "essentially because such confinement cannot be equated with incarceration in an ordinary prison") (Burger, J.). We assume that district judges will keep these considerations in mind when deciding whether to modify YCA treatment terms of a sentence imposed under § 5010(b).

[Footnote 13 is continued on p. 220]

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In conclusion, we are convinced that Congress did not intend that a person who commits serious crimes while serving a YCA sentence should automatically receive treatment that has proved futile. On the other hand, Congress carefully designed this statute to require a sentencing judge, rather than the Bureau of Prisons, to evaluate whether the basic elements of treatment—segregation from adults and individualized programs—are appropriate and consistent with YCA policies over time. Our interpretation comports with the overriding legislative purpose that "once a person [is] committed for treatment under the Act, the execution of sentence [is] to fit the person, not the crime." *Dorszynski*, 418 U. S., at 434.[14]

The dissent insists that the *quid pro quo* argument applies even to a sentence under § 5010(c), because such a sentence is "longer than an adult would generally receive." *Post*, at 231. Whether respondent's sentence was longer than he would have received as an adult is speculation—as is the suggestion that respondent might not have pleaded guilty had he known that the YCA conditions of his unexpired term could be converted to adult conditions *if* he were later to commit an adult crime and *if* the second judge were to find that further YCA treatment would be futile.

[14] Respondent argues that a statutory entitlement to segregation and treatment exists, and that a judge's subsequent modification of those conditions is a deprivation of due process and equal protection and a violation of double jeopardy. Because the lower court had no occasion to address these issues, 642 F. 2d, at 1079, n. 4, we will not address them in the first instance.

The dissenting opinion implies that our interpretation of the statute may violate the Double Jeopardy Clause. *Post*, at 224, n. 3. Although the issue is not properly before us, the suggestion deserves a response. Congress intended that a YCA sentence contain within it the possibility that, if the offender commits a subsequent offense, the court may modify the YCA treatment terms. Such a scheme hardly constitutes multiple punishment, since the offender has, by his own actions, triggered the condition that permits appropriate modification of the terms of confinement. After all, the imposition of confinement when an offender violates his term of probation has never been considered to raise a serious double jeopardy problem. See *United States* v. *DiFrancesco*, 449 U. S. 117, 137 (1980); *id.*, at 148 (no

We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, concurring in the judgment.

The only question presented in this case is whether an offender, the respondent, serving a sentence under the Federal Youth Corrections Act (YCA), 18 U. S. C. § 5005 *et seq.*, and thereafter sentenced to a consecutive term of imprisonment as an adult, must nevertheless be separated from other adult offenders for the remainder of his sentence under that Act. I agree with the Court that the answer to this question must be in the negative. I write separately because it seems to me that the Court's opinion, in addressing broadly the authority of the Director of the Bureau of Prisons (the Director), may be read as unnecessarily curtailing his authority and discretion to act in other cases.

It was a District Court that imposed the consecutive adult term on respondent, but it was the Director who made the *decision* to treat respondent as an adult prisoner no longer entitled to be segregated from adult offenders. I agree with the Court as to the authority of the District Court to impose the consecutive adult term of imprisonment. I confine this concurrence to the issue of authority of the Director.

Respondent pleaded guilty to second-degree murder in 1974. The court sentenced him to 10 years of custody under the YCA. In 1975 respondent was convicted of assaulting a

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double jeopardy problem because defendant is on notice that the sentence is conditional, and because "revocation of parole or probation only results from a change in circumstance subsequent to the grant of parole or probation") (BRENNAN, J., with whom WHITE, MARSHALL, and STEVENS, JJ., joined, dissenting). See also *Ex parte Lange*, 18 Wall. 163, 168 (1874) (Double Jeopardy Clause offers "complete protection of the party when a second punishment is proposed in the same court, *on the same facts*, for the same statutory offence") (emphasis added).

federal guard with a dangerous weapon. He was sentenced to a consecutive 10-year term. The District Court found "that the [respondent] will not benefit any further under the provisions of the Youth Offenders Act and decline[d] to sentence under said act." After it received a report from the Bureau of Prisons, however, the court took two additional actions. It reduced respondent's sentence to five and one-half years, and it recommended—*but did not order*—that respondent "be transferred from [the] Federal Youth Center . . . to a facility providing greater security." In 1977 respondent again was convicted of assaulting a federal guard. He again was given consecutive *adult* sentencing. Two courts thus certified that respondent had shown an incorrigibility and capacity for violence that warrants adult treatment.

In my view, certainly under these circumstances, the Director had the authority to treat the respondent as an adult offender. The YCA directs that youth offenders are to "undergo treatment in institutions of maximum security, medium security, or minimum security types . . . ." 18 U. S. C. § 5011. "'[T]reatment' means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders . . . ." § 5006(f). The Director, *inter alia*, may "order the committed youth offender confined and afforded treatment *under such conditions as he believes best* designed for the protection of the public." § 5015(a)(3) (emphasis added). "The Director may transfer *at any time* a committed youth offender from one agency or institution to *any* other agency or institution." § 5015(b) (emphasis added). "*Insofar as practical*, . . . youth offenders shall be segregated from other offenders . . . ." § 5011 (emphasis added).

Thus, the express language of YCA vests broad discretion in the Director. It contains no mandatory directions that youth segregation must continue indefinitely no matter how clearly appropriate adult treatment may be. The statutory emphasis instead is on flexibility and individualized treat-

ment. See 18 U. S. C. §§ 5005, 5014, 5016, 5017, 5018, and 5020. The YCA does require youth offenders to be separated from adult offenders, but this command is qualified by the phrase "[i]nsofar as practical." We need not in this case consider the limits on the discretion thus conferred. This is an easy case in view of respondent's convictions as an adult offender and the findings of the federal courts. In these circumstances the Director plainly had the authority—indeed the duty—to transfer respondent from the Federal Youth Center to a "facility providing greater security." We properly defer to the Director's judgment that continued segregation from adult offenders is no longer "practical" under such circumstances. Even in the absence of subsequent felony convictions, there could be occasions when, because of a youth offender's incorrigibility and threat to the safety of others, it would be highly *impractical* to continue his segregation in a youth center. As we are not confronted with such a situation in this case, I would limit our decision to the record before us and defer to another day a general discussion of the Director's authority.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE O'CONNOR join, dissenting.

At common law a sentence could be amended during the term in which it was imposed subject to the limitation that "a punishment already partly suffered be not increased."[1] "The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it," *United States* v. *Benz*, 282 U. S. 304,

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[1] "As a general practice, the sentence, when imposed by a court of record, is within the power of the court during the session in which it is entered, and may be amended at any time during such session, *provided a punishment already partly suffered be not increased.*" F. Wharton, Criminal Pleading and Practice § 913, p. 641 (9th ed. 1889) (emphasis added) (quoted in *United States* v. *Benz*, 282 U. S. 304, 307).

307, has been recognized by this Court over and over again.[2] Whether the well-settled rule prohibiting judges from increasing the severity of a sentence after it has become final is constitutionally mandated,[3] it is unquestionably the sort of rule that judges may not disregard without express authorization from Congress.[4]

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[2] See, *e. g.*, *Whalen* v. *United States*, 445 U. S. 684, 703 (REHNQUIST, J., dissenting); *North Carolina* v. *Pearce*, 395 U. S. 711, 730–731 (Douglas, J., concurring); *id.*, at 747 (Harlan, J., concurring in part and dissenting in part); *Reid* v. *Covert*, 354 U. S. 1, 37, n. 68; *Roberts* v. *United States*, 320 U. S. 264, 265–266.

[3] "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence." *Ex parte Lange*, 18 Wall. 163, 168.

Although *United States* v. *DiFrancesco*, 449 U. S. 117, purports to confine *Ex parte Lange* and *United States* v. *Benz*, *supra*, to their specific contexts, see 449 U. S., at 139, the Court's holding in *DiFrancesco* is limited to the situation in which *Congress* has expressly authorized an increase of sentence after the initial sentence has been set aside on *direct appeal*. It is conceded in this case that Congress did not expressly authorize the second sentencing judge to increase the severity of the unexpired YCA sentence.

It is perplexing, but noteworthy, that the Court's opinion, *ante*, at 220–221, n. 14, leaves the Court of Appeals free on remand to declare unconstitutional the Court's construction of the Youth Corrections Act.

[4] This case closely parallels *Roberts* v. *United States*, *supra*. After pleading guilty to a federal offense, Roberts was sentenced to pay a $250 fine and to serve two years in prison. Pursuant to authority under the federal probation statute, the District Court suspended execution of the sentence conditioned upon payment of the fine and ordered Roberts' release on probation for a 5-year period. Four years later, the court after a hearing revoked the probation, set aside the original sentence of two years, and imposed a new sentence of three years. The Court of Appeals affirmed. On petition for certiorari, Roberts argued that the probation statute did not authorize imposition of an increased sentence after revocation of a suspended original sentence and, if not so construed, the statute was unconstitutional. The Court granted certiorari and reversed on statutory grounds, not reaching the constitutional question.

"If the authority exists in federal courts to suspend or to increase a sen-

That rule requires a firm rejection of the argument that a second sentencing judge has power to convert an unexpired YCA sentence into an adult sentence. For there can be no question about the fact that an adult sentence is more severe than a YCA sentence.[5] Nor can we "assume Congress to have intended such a departure from well-established doctrine without a clear expression to disavow it." *Dorszynski* v. *United States*, 418 U. S. 424, 441. It is undisputed that the Youth Corrections Act contains no such clear expression of congressional intent. Indeed, the Court's opinion repeatedly confirms this proposition.[6] The Court's novel holding is

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tence fixed by a valid judgment, it must be derived from the Probation Act. The government concedes that federal courts had no such power prior to passage of that Act. See *Ex parte United States*, 242 U. S. 27; *United States* v. *Mayer*, 235 U. S. 55; *Ex parte Lange*, 18 Wall. 163; *United States* v. *Benz*, 282 U. S. 304." 320 U. S., at 265–266.

The Court concluded that, despite language in the statute that "the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed," the Probation Act did not authorize such an increased sentence. The Court held that "having exercised its discretion by sentencing an offender to a definite term of imprisonment in advance of probation, a court may not later upon revocation of probation set aside that sentence and increase the term of imprisonment." *Id.*, at 272–273.

Thus, *Roberts* recognizes the critical distinction between changing a sentence after it has been imposed and postponing imposition of a sentence. The Court today not only ignores this distinction, see *ante*, at 217–218, n. 10, 220–221, n. 14, but does not even cite *Roberts*.

[5] The Court does not deny that an adult sentence of a given number of years is more severe than a YCA sentence for the same number of years. As THE CHIEF JUSTICE, then a Circuit Judge, stated for the United States Court of Appeals for the District of Columbia Circuit, YCA "confinement cannot be equated with incarceration in an ordinary prison." *Carter* v. *United States*, 113 U. S. App. D. C. 123, 125, 306 F. 2d 283, 285 (1962). See *United States* v. *McDonald*, 611 F. 2d 1291, 1294–1295 (CA9 1980); *Rogers* v. *United States*, 326 F. 2d 56, 57 (CA10 1963); 18 U. S. C. § 5011; H. R. Rep. No. 2979, 81st Cong., 2d Sess., 3 (1950).

[6] The Court admits that "[n]o provision of the YCA explicitly governs the issue before us," *ante*, at 213; that "[t]he statute describes the sentenc-

supported by nothing more than inferences drawn from the "history and structure of the YCA." See *ante*, at 214. Manifestly, such inferences are insufficient to justify a judicial rewriting of what "has been accurately described as the most comprehensive federal statute concerned with sentencing." *Dorszynski*, *supra*, at 432.

The Court's first argument rests on the premise that Congress did not intend either that corrigible youth offenders be housed with incorrigible youth offenders or that futile YCA treatment be continued. The Court reasons that continued YCA treatment is in derogation of such congressional intent whenever a youth offender, while serving his YCA sentence, commits another crime sufficiently serious to convince the second sentencing judge that the youth will no longer benefit from YCA treatment. *Ante*, at 214–215. All of this may

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ing options available to a judge after conviction but does not elucidate what options would be available after the defendant has been convicted of a second crime while serving his initial sentence," *ibid.*; that "§ 5010 (d) does not expressly authorize a second judge to make a 'no benefit' finding with respect to the remainder of an unexpired YCA sentence," *ibid.*; and that "the legislative history reveals no explicit discussion of the trial court's options in sentencing a youth who commits a crime while serving a YCA sentence; Congress apparently did not consider this specific problem," *ante*, at 214. Petitioner agrees:

"Nothing in the language of the YCA is specifically directed to the problem of an offender who, while serving a YCA sentence, commits a crime and receives a consecutive term of imprisonment as an adult, thus acquiring a dual status as both an adult offender and a YCA offender. The legislative history reveals that Congress, in its optimism about the new approach, did not consider or provide for the situation in which a youth offender would commit a serious crime while rehabilitation was underway." Brief for Petitioner 12–13.

Indeed, petitioner urges the Court to defer to the Bureau of Prisons' interpretation of the Youth Corrections Act, see Bureau of Prisons Policy Statement No. 5215.2 (Dec. 12, 1978), an argument the Court soundly rejects. *Ante*, at 212–213. I agree with the Court that the Bureau of Prisons does not have power under the Youth Corrections Act to terminate YCA treatment.

well be true, but it does not follow that the second sentencing judge may impose a consecutive adult sentence and also confine the offender as an adult under the unexpired YCA sentence. A much less drastic solution will accomplish the objectives ascribed to Congress. The second judge simply may impose a concurrent adult sentence and thereby end the offender's YCA treatment.[7] Moreover, even if, as in this case, the second sentencing judge imposes a consecutive rather than a concurrent sentence, prison officials nonetheless can effectuate these objectives by exercising their authority to terminate the YCA confinement and allow the consecutive adult sentence to commence. See 18 U. S. C. § 5017. It is therefore clear that the Court's premise does not support its conclusion that Congress must have intended that the second sentencing judge may modify the first sentence by increasing its severity.[8]

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[7] Petitioner objects to that alternative solution because, with consecutive sentences, the judge can impose a harsher sentence. See Tr. of Oral Arg. 14–15, 48. I am confident, however, that the maximum sentences authorized for serious crimes (or even less serious crimes) are sufficiently high to satisfy this objection. Title 18 U. S. C. § 111, under which respondent in 1975 was convicted and sentenced to 5½ years' imprisonment, authorizes as a penalty a fine of not more than $10,000 or imprisonment of not more than 10 years, or both. Even if these statutory maximums were inadequate, as this Court stated in response to a youth offender's claim that his sentence was too harsh, "'the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction,' [*Blockburger* v. *United States*, 284 U. S. 299, 305], since '[w]hatever views may be entertained regarding severity of punishment . . . [t]hese are peculiarly questions of legislative policy.' [*Gore* v. *United States*, 357 U. S. 386, 393]." *Dorszynski* v. *United States*, 418 U. S. 424, 442.

[8] Indeed, the Court concedes the practicality point:

"We see no relevant difference in the fact that concurrent sentences traditionally take effect immediately. As we hold today, a judge imposing a *consecutive* adult sentence may find that continued YCA treatment during the unexpired term would be futile, and his finding may take effect immediately. In either case, the YCA permits a judge to effectuate his finding with respect to whether future YCA treatment would be beneficial. Of

The Court's second argument is no better. The Court notes that, "in several circumstances, the YCA permits a youth offender initially sentenced under the YCA to be treated as an adult for what would otherwise be the remainder of the YCA sentence." *Ante*, at 215. The Court's examples are set forth in the margin.[9] I do not disagree with the Court that the imposition of a YCA sentence does not entitle an offender to YCA treatment for the full length of that sentence no matter what crimes he commits in the interim, or that respondent could have been subjected to immediate adult confinement in each of the Court's examples. I do not agree, however, that a second judge may impose adult treatment on an offender who continues to be incarcerated not on the basis of a subsequent adult sentence but on the basis of the original YCA sentence. None of the Court's examples

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course, a concurrent sentence of a given length will result in a shorter ultimate sentence than a consecutive sentence of that length; but a judge wishing to impose a longer ultimate sentence may simply increase the length of the concurrent sentence accordingly." *Ante*, at 216–217, n. 9 (emphasis in original).

[9] "For example, the statute permits a court to sentence a defendant to an adult term if he commits an adult offense after receiving a suspended sentence and probation under § 5010(a). If respondent had been sentenced initially to probation under § 5010(a) and had been subsequently convicted of criminal assault, the court could have imposed an adult sentence for the original crime, for the assault, or for both, to begin immediately. . . .

"Moreover, respondent concedes that the statute permits a judge to impose a *concurrent* adult sentence on an offender who is serving a YCA term. Such an adult sentence would commence at the time that it was imposed and would modify the YCA treatment that the offender would otherwise receive for the remainder of his term. Finally, every offender sentenced under the YCA *must* be released conditionally two years prior to the termination of his sentence. 18 U. S. C. § 5017. However, if the offender violates the terms of this conditional release by committing a crime, the conditional release may be revoked and an adult sentence may immediately be imposed, notwithstanding the fact that the youth sentence has not yet expired." *Ante*, at 215–217 (footnotes omitted and emphasis in original).

poses that situation; hence there is no reason to suppose that Congress intended that any authority, even a court, may increase the severity of a sentence after that sentence has become final. In fact, as the Court points out in a footnote, the only statutory authorization for a judicial modification of a YCA sentence permits "a judge [to] *reduce* the severity of the terms of commitment in light of changed circumstances." *Ante*, at 215, n. 7 (emphasis in original); see 18 U. S. C. §§ 5021, 5023.

There is, therefore, nothing in the text, history, or structure of the Youth Corrections Act that supports the Court's holding that a judge may increase the severity of a YCA sentence after it has become final.[10] Even apart from the constitutional problem with such a holding, see n. 3, *supra*, this absence of statutory support is fatal.[11] Not only did Con-

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[10] Writing for the Court of Appeals, Judge Swygert made the point in this way:

"The Warden asks us to read into this Act which has as its ultimate purpose rehabilitation, a highly unusual sentencing option that would permit one judge to reevaluate another judge's YCA sentence and impose in its place a traditional adult sentence. There is 'not a word' in the statute or its legislative history 'about augmenting sentences or about having a second judge in any way change them.' *[Thompson* v. *Carlson,]* 624 F. 2d 415, 426 (3d Cir. 1980) (Adams, J., dissenting). Such a reading is contrary to the letter and the spirit of the act, and the cited provisions do not convince us otherwise." 642 F. 2d 1077, 1081 (CA7 1981).

[11] The Court asserts that the common-law rule that a sentence may not be increased after it has become final "simply does not apply when Congress has provided a court with the power to modify a sentence in light of changed circumstances. . . . Here, the statute permits a judge to modify the conditions of a YCA sentence if the offender is convicted of a subsequent adult crime and if further YCA treatment would be futile." *Ante*, at 218, n. 10. Of course, whether Congress expressed an intent to depart from the common-law rule is the critical question. The Court and petitioner concede that neither the statute nor the legislative history evinces such an intent because Congress did not contemplate the situation. See n. 6, *supra*. Nor do the Court's historical and structural arguments support the result the Court reaches. See discussion *supra*, at 226–228 and this page. The Court simply imposes the result it thinks makes the most

gress not intend the result reached by the Court today, there is good reason to believe that Congress intended just the opposite.

In enacting the Youth Corrections Act, Congress recognized that a YCA sentence of a given number of years is qualitatively less severe than an adult sentence of equal length.[12] Indeed, § 5010(b) authorizes a district court to impose a longer YCA sentence (up to six years) than would be authorized if the offender were sentenced as an adult. The federal courts unanimously have upheld § 5010(b) against constitutional challenges on the reasoning early expressed by THE CHIEF JUSTICE when a Circuit Judge and often quoted thereafter:

> "[T]he basic theory of that Act is rehabilitative and in a sense this rehabilitation may be regarded as comprising the *quid pro quo* for a longer confinement but under different conditions and terms than a defendant would undergo in an ordinary prison. . . . [T]he Youth Corrections Act 'provides for and affords youthful offenders, in the discretion of the judge, not heavier penalties and punishment than are imposed upon adult offenders, but the opportunity to escape from the physical and psychological shocks and traumas attendant upon serving an ordinary penal sentence while obtaining the benefits of corrective treatment, looking to rehabilitation and social redemption and restoration.'" *Carter* v. *United States*, 113 U. S. App. D. C. 123, 125, 306 F. 2d 283, 285 (1962) (quoting *Cunningham* v. *United States*, 256 F. 2d 467, 472 (CA5 1958)).[13]

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sense. While such interstitial lawmaking may be appropriate in some circumstances, it surely is not warranted when the Court is bound to follow the common-law rule absent *affirmative* evidence that Congress intended to depart from that rule.

[12] See n. 5, *supra*.

[13] Accord, *e. g.*, *Abernathy* v. *United States*, 418 F. 2d 288, 290 (CA5 1969); *Johnson* v. *United States*, 374 F. 2d 966, 967 (CA4 1967); *Brisco* v. *United States*, 368 F. 2d 214, 215 (CA3 1966); *Kotz* v. *United States*, 353 F.

It is of no consequence that respondent was sentenced not under § 5010(b), but under § 5010(c), for the same *quid pro quo* theory that justifies longer YCA terms than maximum adult terms for a given offense also justifies YCA terms within the statutory adult maximum but longer than an adult would generally receive. See *Watts* v. *Hadden*, 651 F. 2d 1354, 1365 (CA10 1981); *United States ex rel. Dancy* v. *Arnold*, 572 F. 2d 107, 111 (CA3 1978). It is no coincidence that the Youth Corrections Act vests broad authority in the district judge to impose lengthy YCA sentences and also vests broad authority in prison officials to order early releases of youth offenders from their YCA sentences.[14] The proponents of the Youth Corrections Act repeatedly emphasized that prison officials must be given sufficient time to rehabilitate youth offenders and sufficient authority to release rehabilitated offenders from their custodial sentences.[15] As the then Director of the Bureau of Prisons explained before the Senate Subcommittee studying the proposed Youth Corrections Act in 1949, the imposition of ordinary adult-length sentences on youth offenders was completely unrelated to the

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2d 312, 314 (CA8 1965); *Eller* v. *United States*, 327 F. 2d 639 (CA9 1964); *Rogers* v. *United States*, 326 F. 2d 56, 56–57 (CA10 1963). Cf. *United States ex rel. Sero* v. *Preiser*, 506 F. 2d 1115, 1123–1124 (CA2 1974) (New York law), cert. denied, 421 U. S. 921; *United States ex rel. Wilson* v. *Coughlin*, 472 F. 2d 100, 102–103 (CA7 1973) (Illinois law).

[14] See 18 U. S. C. §§ 5010, 5017.

[15] See, *e. g.*, Correctional System for Youthful Offenders: Hearings on S. 1114 and S. 2609 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st Sess., 22, 24, 27 (statement of James V. Bennett, Director, Bureau of Prisons), 33 (statement of Curtis Shears, Chairman, Youth Participation Committee, D. C. Department of American Legion), 53–55 (statement of Carroll Hincks, U. S. District Judge), 62, 66 (statement of Orie L. Phillips, U. S. Circuit Judge) (1949); Federal Corrections Act and Improvement in Parole: Hearings on H. R. 2139 and H. R. 2140 before Subcommittee No. 3 of the House Committee on the Judiciary, 78th Cong., 1st Sess., 74–75 (extension of statement of Carroll C. Hincks), 138–139 (Reference Notes on Federal Corrections Act, submitted by James V. Bennett) (1943).

rehabilitative effort; the sentences were either far too long or far too short.[16] The promises of treatment and of early release justified the imposition of longer YCA sentences.

If a second sentencing judge is able to convert an unexpired YCA sentence into an adult sentence, the *quid pro quo* vanishes. The youth offender who is sentenced to a longer term of confinement when sentenced under the YCA than if he were sentenced as an adult may end up, as respondent will under the Court's holding, serving that lengthier sentence under the adult conditions he paid a price to avoid. Furthermore, he is not entitled for the duration of that sentence to the good-time allowances available to offenders sentenced as adults.[17] The humanitarian objectives of

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[16] "From the hundreds of cases of this type which have come across my desk I have formed the conclusion that in the task of correcting the offender the crucial element is that of time. Attitudes, habits, interests, standards cannot be changed overnight. Training in work habits and skills requires time. Once the individual has received the maximum benefit from the institutional program, however, it is just as important that his release to the community be effected promptly. In the case of each person confined there comes a period when he has his best prospects of making good in the community. His release should occur at that time. If he is released earlier he will not be ready for the task of establishing himself; if later, he may have become bitter, unsure of himself, or jittery like the athlete who is overtrained.

"Rarely does a day go by in one of our institutions for younger offenders without a youth being received whose sentence is either far too long or far too short, if the institution is to carry out its objective of correctional treatment.

"I have seen thousands of men rightly sent to prison but wrongly for periods so short that their imprisonment was only an expense to the Government and accomplished little so far as the rehabilitation of the man or the protection of the community was concerned. I have seen men sent to prison for so long that all efforts in their behalf were frustrated." Hearings on S. 1114 and S. 2609, *supra* n. 15, at 27 (statement of James V. Bennett).

[17] See *Staudmier* v. *United States*, 496 F. 2d 1191, 1192 (CA10 1974); *Hale* v. *United States*, 307 F. Supp. 345, 346 (WD Okla. 1970); *Foote* v. *United States*, 306 F. Supp. 627, 628–629 (Nev. 1969).

the Youth Corrections Act do not justify fundamental unfairness.[18]

If the original sentencing judge had known that a subsequent adult sentence could result in expiration of YCA treatment but not of the YCA sentence, he might well have discounted the length of the YCA sentence to reflect this possibility.[19] Moreover, if respondent had known of this possibility, he might have elected to stand trial rather than to plead guilty.[20] Speculation of this kind[21] would be unnecessary if the Court declined to enlarge upon the statute that Congress has written. If an amendment to the statute is needed to deal with a problem that Congress did not foresee, it is Congress—not this Court—that must perform that task.

I do not purport to know whether YCA treatment is effective for youthful offenders in general, or would serve any

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[18] I had thought that Justice Fortas, writing so eloquently for the Court in *In re Gault*, 387 U. S. 1, 12–31, with specific reference to the juvenile justice system, had settled that point.

[19] Bureau of Prisons Policy Statement No. 5215.2 (Dec. 12, 1978), which purports to exclude from YCA treatment YCA-sentenced offenders who are also sentenced to a concurrent or consecutive adult term, was promulgated four and one-half years after respondent was sentenced under the Youth Corrections Act.

[20] Respondent pleaded guilty to the offense for which he was sentenced to 10 years' confinement under the Youth Corrections Act. *Ante*, at 203. For challenges against such guilty pleas on the ground that the defendant was not fully apprised of the consequences of being sentenced under the Youth Corrections Act, see, *e. g.*, *Marvel* v. *United States*, 380 U. S. 262; *Caldwell* v. *United States*, 435 F. 2d 1079 (CA10 1970); *James* v. *United States*, 388 F. 2d 453 (CA5 1968); *Freeman* v. *United States*, 350 F. 2d 940 (CA9 1965); *Chapin* v. *United States*, 341 F. 2d 900 (CA10 1965); *Pilkington* v. *United States*, 315 F. 2d 204 (CA4 1963); *Carter* v. *United States*, 113 U. S. App. D. C. 123, 306 F. 2d 283 (1962).

[21] Indeed, the Court of Appeals suggested that even the second and third sentencing judges might have imposed different sentences had they known that a no-benefit finding would take effect immediately rather than when the consecutive adult sentence commenced. See 642 F. 2d, at 1082; see also *ante*, at 219 (noting the "interpretive difficulties" of the subsequent sentencing judges' intent with respect to treatment during the remainder of the YCA term).

useful purpose for this particular offender.[2] No such question is relevant to the legal issue raised by this case. The only question presented is whether a federal judge confronted with the task of sentencing an inmate for an offense committed while he is serving a sentence for an earlier crime may not only impose the punishment authorized by law for the later offense but may also take it upon himself to enhance the earlier sentence as well. The answer to that question seems so obvious to me that I shall not further belabor it.

I respectfully dissent.

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[2] In his concurring opinion in the Court of Appeals, Judge Pell succinctly put these considerations to one side:

"While I see, on this record, no indication to think that either Robinson or society will benefit by continuing the YCA treatment, Congress, by the statute applicable in this case, has mandated the continuance." 642 F. 2d, at 1083.

Syllabus

PIPER AIRCRAFT CO. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80–848. Argued October 14, 1981—Decided December 8, 1981*

Respondent, as representative of the estates of several citizens and residents of Scotland who were killed in an airplane crash in Scotland during a charter flight, instituted wrongful-death litigation in a California state court against petitioners, which are the company that manufactured the plane in Pennsylvania and the company that manufactured the plane's propellers in Ohio. At the time of the crash the plane was registered in Great Britain and was owned and operated by companies organized in the United Kingdom. The pilot and all of the decedents' heirs and next of kin were Scottish subjects and citizens, and the investigation of the accident was conducted by British authorities. Respondent sought to recover from petitioners on the basis of negligence or strict liability (not recognized by Scottish law), and admitted that the action was filed in the United States because its laws regarding liability, capacity to sue, and damages are more favorable to respondent's position than those of Scotland. On petitioners' motion, the action was removed to a Federal District Court in California and was then transferred to the United States District Court for the Middle District of Pennsylvania, pursuant to 28 U. S. C. § 1404(a). The District Court granted petitioners' motion to dismiss the action on the ground of *forum non conveniens*. Relying on the test set forth in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, and analyzing the "private interest factors" affecting the litigants' convenience and the "public interest factors" affecting the forum's convenience, as set forth in *Gilbert*, the District Court concluded that Scotland was the appropriate forum. However, the Court of Appeals reversed, holding that the District Court had abused its discretion in conducting the *Gilbert* analysis and that, in any event, dismissal is automatically barred where

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*Together with No. 80–883, *Hartzell Propeller, Inc.* v. *Reyno, Personal Representative of the Estates of Fehilly et al.*, also on certiorari to the same court.

the law of the alternative forum is less favorable to the plaintiff than the law of the forum chosen by the plaintiff.

Held:

1. Plaintiffs may not defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the chosen forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry. *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413. Pp. 247–255.

(a) Under *Gilbert*, *supra*, dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice. If substantial weight were given to the possibility of an unfavorable change in law, however, dismissal might be barred even where trial in the chosen forum was plainly inconvenient, and the *forum non conveniens* doctrine would become virtually useless. Such an approach not only would be inconsistent with the purpose of the *forum non conveniens* doctrine, but also would pose substantial practical problems, requiring that trial courts determine complex problems in conflict of laws and comparative law, and increasing the flow into American courts of litigation by foreign plaintiffs against American manufacturers. Pp. 248–252.

(b) Nor may an analogy be drawn between *forum non conveniens* dismissals and transfers between federal courts pursuant to 28 U. S. C. § 1404(a), which was construed in *Van Dusen* v. *Barrack*, 376 U. S. 612, as precluding a transfer if it resulted in a change in the applicable law. The statute was enacted to permit change of venue between federal courts, and although it was drafted in accordance with the doctrine of *forum non conveniens*, it was intended to be a revision rather than a codification of the common law. District courts were given more discretion to transfer under § 1404(a) than they had to dismiss on grounds of *forum non conveniens*. *Van Dusen* v. *Barrack*, *supra*, distinguished. Pp. 253–254.

2. The District Court properly decided that the presumption in favor of the plaintiff's forum choice applied with less than maximum force when the plaintiff or (as here) the real parties in interest are foreign. When the plaintiff has chosen the home forum, it is reasonable to assume that the choice is convenient; but when the plaintiff or real parties in interest are foreign, this assumption is much less reasonable and the plaintiff's choice deserves less deference. Pp. 255–256.

3. The *forum non conveniens* determination is committed to the trial court's sound discretion and may be reversed only when there has been a clear abuse of discretion. Here, the District Court did not abuse its discretion in weighing the private and public interests under the *Gilbert* analysis and thereby determining that the trial should be held in Scotland. Pp. 257–261.

(a) In analyzing the private interest factors, the District Court did not act unreasonably in concluding that fewer evidentiary problems would be posed if the trial were held in Scotland, a large proportion of the relevant evidence being located there. The District Court also correctly concluded that the problems posed by the petitioners' inability to implead potential Scottish third-party defendants—the pilot's estate, the plane's owners, and the charter company—supported holding the trial in Scotland. Pp. 257–259.

(b) The District Court's review of the factors relating to the public interest was also reasonable. Even aside from the question whether Scottish law might be applicable in part, all other public interest factors favor trial in Scotland, which has a very strong interest in this litigation. The accident occurred there, all of the decedents were Scottish, and apart from petitioners, all potential parties are either Scottish or English. As to respondent's argument that American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products and that additional deterrence might be obtained by trial in the United States where they could be sued on the basis of both negligence and strict liability, any incremental deterrence from trial in an American court is likely to be insignificant and is not sufficient to justify the enormous commitment of judicial time and resources that would be required. Pp. 259–261.

630 F. 2d 149, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined, and in Parts I and II of which WHITE, J., joined. WHITE J., filed an opinion concurring in part and dissenting in part, *post*, p. 261. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 261. POWELL, J., took no part in the decision of the cases. O'CONNOR, J., took no part in the consideration or decision of the cases.

James M. Fitzsimons argued the cause for petitioner in No. 80–848. With him on the brief were *Charles J. McKelvey*, *Ann S. Pepperman*, and *Keith A. Jones*. *Warner W. Gardner* argued the cause for petitioner in

No. 80–883. With him on the briefs were *Nancy J. Bregstein* and *Ronald C. Scott.*

Daniel C. Cathcart argued the cause and filed a brief for respondent in both cases.†

JUSTICE MARSHALL delivered the opinion of the Court.

These cases arise out of an air crash that took place in Scotland. Respondent, acting as representative of the estates of several Scottish citizens killed in the accident, brought wrongful-death actions against petitioners that were ultimately transferred to the United States District Court for the Middle District of Pennsylvania. Petitioners moved to dismiss on the ground of *forum non conveniens.* After noting that an alternative forum existed in Scotland, the District Court granted their motions. 479 F. Supp. 727 (1979). The United States Court of Appeals for the Third Circuit reversed. 630 F. 2d 149 (1980). The Court of Appeals based its decision, at least in part, on the ground that dismissal is automatically barred where the law of the alternative forum is less favorable to the plaintiff than the law of the forum chosen by the plaintiff. Because we conclude that the possibility of an unfavorable change in law should not, by itself, bar dismissal, and because we conclude that the District Court did not otherwise abuse its discretion, we reverse.

I

A

In July 1976, a small commercial aircraft crashed in the Scottish highlands during the course of a charter flight from

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†*John D. Dillow, Samuel F. Pearce, John J. Hennelly, Jr.*, and *Thomas C. Walsh* filed a brief for Boeing Co. et al. as *amici curiae* urging reversal.

Thomas G. Smith filed a brief for the Law Offices of Gerald C. Stearns as *amicus curiae* urging affirmance.

Blackpool to Perth. The pilot and five passengers were killed instantly. The decedents were all Scottish subjects and residents, as are their heirs and next of kin. There were no eyewitnesses to the accident. At the time of the crash the plane was subject to Scottish air traffic control.

The aircraft, a twin-engine Piper Aztec, was manufactured in Pennsylvania by petitioner Piper Aircraft Co. (Piper). The propellers were manufactured in Ohio by petitioner Hartzell Propeller, Inc. (Hartzell). At the time of the crash the aircraft was registered in Great Britain and was owned and maintained by Air Navigation and Trading Co., Ltd. (Air Navigation). It was operated by McDonald Aviation, Ltd. (McDonald), a Scottish air taxi service. Both Air Navigation and McDonald were organized in the United Kingdom. The wreckage of the plane is now in a hangar in Farnsborough, England.

The British Department of Trade investigated the accident shortly after it occurred. A preliminary report found that the plane crashed after developing a spin, and suggested that mechanical failure in the plane or the propeller was responsible. At Hartzell's request, this report was reviewed by a three-member Review Board, which held a 9-day adversary hearing attended by all interested parties. The Review Board found no evidence of defective equipment and indicated that pilot error may have contributed to the accident. The pilot, who had obtained his commercial pilot's license only three months earlier, was flying over high ground at an altitude considerably lower than the minimum height required by his company's operations manual.

In July 1977, a California probate court appointed respondent Gaynell Reyno administratrix of the estates of the five passengers. Reyno is not related to and does not know any of the decedents or their survivors; she was a legal secretary to the attorney who filed this lawsuit. Several days after her appointment, Reyno commenced separate wrongful-

death actions against Piper and Hartzell in the Superior Court of California, claiming negligence and strict liability.[1] Air Navigation, McDonald, and the estate of the pilot are not parties to this litigation. The survivors of the five passengers whose estates are represented by Reyno filed a separate action in the United Kingdom against Air Navigation, McDonald, and the pilot's estate.[2] Reyno candidly admits that the action against Piper and Hartzell was filed in the United States because its laws regarding liability, capacity to sue, and damages are more favorable to her position than are those of Scotland. Scottish law does not recognize strict liability in tort. Moreover, it permits wrongful-death actions only when brought by a decedent's relatives. The relatives may sue only for "loss of support and society."[3]

On petitioners' motion, the suit was removed to the United States District Court for the Central District of California. Piper then moved for transfer to the United States District Court for the Middle District of Pennsylvania, pursuant to 28 U. S. C. § 1404(a).[4] Hartzell moved to dismiss for lack of personal jurisdiction, or in the alternative, to transfer.[5] In December 1977, the District Court quashed service on

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[1] Avco-Lycoming, Inc., the manufacturer of the plane's engines, was also named as a defendant. It was subsequently dismissed from the suit by stipulation.

[2] The pilot's estate has also filed suit in the United Kingdom against Air Navigation, McDonald, Piper, and Hartzell.

[3] See Affidavit of Donald Ian Kerr MacLeod, App. A19 (affidavit submitted to District Court by petitioners describing Scottish law). Suits for damages are governed by The Damages (Scotland) Act 1976.

[4] Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[5] The District Court concluded that it could not assert personal jurisdiction over Hartzell consistent with due process. However, it decided not to dismiss Hartzell because the corporation would be amenable to process in Pennsylvania.

Hartzell and transferred the case to the Middle District of Pennsylvania. Respondent then properly served process on Hartzell.

B

In May 1978, after the suit had been transferred, both Hartzell and Piper moved to dismiss the action on the ground of *forum non conveniens*. The District Court granted these motions in October 1979. It relied on the balancing test set forth by this Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1947), and its companion case, *Koster* v. *Lumbermens Mut. Cas. Co.*, 330 U. S. 518 (1947). In those decisions, the Court stated that a plaintiff's choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would "establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems," the court may, in the exercise of its sound discretion, dismiss the case. *Koster*, *supra*, at 524. To guide trial court discretion, the Court provided a list of "private interest factors" affecting the convenience of the litigants, and a list of "public interest factors" affecting the convenience of the forum. *Gilbert*, *supra*, at 508–509.[6]

[6]The factors pertaining to the private interests of the litigants included the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gilbert*, 330 U. S., at 508. The public factors bearing on the question included the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.*, at 509.

After describing our decisions in *Gilbert* and *Koster*, the District Court analyzed the facts of these cases. It began by observing that an alternative forum existed in Scotland; Piper and Hartzell had agreed to submit to the jurisdiction of the Scottish courts and to waive any statute of limitations defense that might be available. It then stated that plaintiff's choice of forum was entitled to little weight. The court recognized that a plaintiff's choice ordinarily deserves substantial deference. It noted, however, that Reyno "is a representative of foreign citizens and residents seeking a forum in the United States because of the more liberal rules concerning products liability law," and that "the courts have been less solicitous when the plaintiff is not an American citizen or resident, and particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States." 479 F. Supp., at 731.

The District Court next examined several factors relating to the private interests of the litigants, and determined that these factors strongly pointed towards Scotland as the appropriate forum. Although evidence concerning the design, manufacture, and testing of the plane and propeller is located in the United States, the connections with Scotland are otherwise "overwhelming." *Id.*, at 732. The real parties in interest are citizens of Scotland, as were all the decedents. Witnesses who could testify regarding the maintenance of the aircraft, the training of the pilot, and the investigation of the accident—all essential to the defense—are in Great Britain. Moreover, all witnesses to damages are located in Scotland. Trial would be aided by familiarity with Scottish topography, and by easy access to the wreckage.

The District Court reasoned that because crucial witnesses and evidence were beyond the reach of compulsory process, and because the defendants would not be able to implead potential Scottish third-party defendants, it would be "unfair to make Piper and Hartzell proceed to trial in this forum." *Id.*,

at 733. The survivors had brought separate actions in Scotland against the pilot, McDonald, and Air Navigation. "[I]t would be fairer to all parties and less costly if the entire case was presented to one jury with available testimony from all relevant witnesses." *Ibid.* Although the court recognized that if trial were held in the United States, Piper and Hartzell could file indemnity or contribution actions against the Scottish defendants, it believed that there was a significant risk of inconsistent verdicts.[7]

The District Court concluded that the relevant public interests also pointed strongly towards dismissal. The court determined that Pennsylvania law would apply to Piper and Scottish law to Hartzell if the case were tried in the Middle District of Pennsylvania.[8] As a result, "trial in this forum would be hopelessly complex and confusing for a jury." *Id.*, at 734. In addition, the court noted that it was unfamiliar with Scottish law and thus would have to rely upon experts from that country. The court also found that the trial would be enormously costly and time-consuming; that it would be unfair to burden citizens with jury duty when the Middle Dis-

[7] The District Court explained that inconsistent verdicts might result if petitioners were held liable on the basis of strict liability here, and then required to prove negligence in an indemnity action in Scotland. Moreover, even if the same standard of liability applied, there was a danger that different juries would find different facts and produce inconsistent results.

[8] Under *Klaxon* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941), a court ordinarily must apply the choice-of-law rules of the State in which it sits. However, where a case is transferred pursuant to 28 U. S. C. § 1404(a), it must apply the choice-of-law rules of the State from which the case was transferred. *Van Dusen* v. *Barrack*, 376 U. S. 612 (1946). Relying on these two cases, the District Court concluded that California choice-of-law rules would apply to Piper, and Pennsylvania choice-of-law rules would apply to Hartzell. It further concluded that California applied a "governmental interests" analysis in resolving choice-of-law problems, and that Pennsylvania employed a "significant contacts" analysis. The court used the "governmental interests" analysis to determine that Pennsylvania liability rules would apply to Piper, and the "significant contacts" analysis to determine that Scottish liability rules would apply to Hartzell.

trict of Pennsylvania has little connection with the controversy; and that Scotland has a substantial interest in the outcome of the litigation.

In opposing the motions to dismiss, respondent contended that dismissal would be unfair because Scottish law was less favorable. The District Court explicitly rejected this claim. It reasoned that the possibility that dismissal might lead to an unfavorable change in the law did not deserve significant weight; any deficiency in the foreign law was a "matter to be dealt with in the foreign forum." *Id.*, at 738.

C

On appeal, the United States Court of Appeals for the Third Circuit reversed and remanded for trial. The decision to reverse appears to be based on two alternative grounds. First, the Court held that the District Court abused its discretion in conducting the *Gilbert* analysis. Second, the Court held that dismissal is never appropriate where the law of the alternative forum is less favorable to the plaintiff.

The Court of Appeals began its review of the District Court's *Gilbert* analysis by noting that the plaintiff's choice of forum deserved substantial weight, even though the real parties in interest are nonresidents. It then rejected the District Court's balancing of the private interests. It found that Piper and Hartzell had failed adequately to support their claim that key witnesses would be unavailable if trial were held in the United States: they had never specified the witnesses they would call and the testimony these witnesses would provide. The Court of Appeals gave little weight to the fact that Piper and Hartzell would not be able to implead potential Scottish third-party defendants, reasoning that this difficulty would be "burdensome" but not "unfair," 630 F. 2d, at 162.[9] Finally, the court stated that resolution of the suit

[9]The court claimed that the risk of inconsistent verdicts was slight because Pennsylvania and Scotland both adhere to principles of res judicata.

would not be significantly aided by familiarity with Scottish topography, or by viewing the wreckage.

The Court of Appeals also rejected the District Court's analysis of the public interest factors. It found that the District Court gave undue emphasis to the application of Scottish law: "'the mere fact that the court is called upon to determine and apply foreign law does not present a legal problem of the sort which would justify the dismissal of a case otherwise properly before the court.'" *Id.*, at 163 (quoting *Hoffman* v. *Goberman*, 420 F. 2d 423, 427 (CA3 1970)). In any event, it believed that Scottish law need not be applied. After conducting its own choice-of-law analysis, the Court of Appeals determined that American law would govern the actions against both Piper and Hartzell.[10] The same choice-of-law analysis apparently led it to conclude that Pennsylvania and Ohio, rather than Scotland, are the jurisdictions with the greatest policy interests in the dispute, and that all other public interest factors favored trial in the United States.[11]

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[10] The Court of Appeals agreed with the District Court that California choice-of-law rules applied to Piper, and that Pennsylvania choice-of-law rules applied to Hartzell, see n. 8, *supra*. It did not agree, however, that California used a "governmental interests" analysis and that Pennsylvania used a "significant contacts" analysis. Rather, it believed that both jurisdictions employed the "false conflicts" test. Applying this test, it concluded that Ohio and Pennsylvania had a greater policy interest in the dispute than Scotland, and that American law would apply to both Piper and Hartzell.

[11] The court's reasoning on this point is somewhat unclear. It states:

"We have held that under the applicable choice of law rules Pennsylvania and Ohio are the jurisdictions with the greatest policy interest in this dispute. It follows that the other public interest factors that should be considered under the Supreme Court cases of *Gilbert* and *Koster* favor trial in this country rather than Scotland." 630 F. 2d, at 171.

The Court of Appeals concluded as part of its choice-of-law analysis that the United States had the greatest policy interest in the dispute. See n. 10, *supra*. It apparently believed that this conclusion necessarily implied that the *forum non conveniens* public interest factors pointed toward trial in the United States.

In any event, it appears that the Court of Appeals would have reversed even if the District Court had properly balanced the public and private interests. The court stated:

> "[I]t is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case. But . . . a dismissal for forum non conveniens, like a statutory transfer, 'should not, despite its convenience, result in a change in the applicable law.' Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified." 630 F. 2d, at 163–164 (footnote omitted) (quoting *DeMateos* v. *Texaco, Inc.*, 562 F. 2d 895, 899 (CA3 1977), cert. denied, 435 U. S. 904 (1978)).

In other words, the court decided that dismissal is automatically barred if it would lead to a change in the applicable law unfavorable to the plaintiff.

We granted certiorari in these cases to consider the questions they raise concerning the proper application of the doctrine of *forum non conveniens*. 450 U. S. 909 (1981).[12]

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[12] We granted certiorari in No. 80–848 to consider the question "[w]hether, in an action in federal district court brought by foreign plaintiffs against American defendants, the plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied if the case were litigated in the district court is more favorable to them than the law that would be applied by the courts of their own nation." We granted certiorari in No. 80–883 to consider the question whether "a motion to dismiss on grounds of *forum non conveniens* [should] be denied whenever the law of the alternate forum is less favorable to recovery than that which would be applied by the district court."

In this opinion, we begin by considering whether the Court of Appeals properly held that the possibility of an unfavorable change in law automatically bars dismissal. Part II, *infra*. Since we conclude that the Court of Appeals erred, we then consider its review of the District Court's *Gilbert* analysis to determine whether dismissal was otherwise appropriate. Part

II

The Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.

We expressly rejected the position adopted by the Court of Appeals in our decision in *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413 (1932). That case arose out of a collision between two vessels in American waters. The Canadian owners of cargo lost in the accident sued the Canadian owners of one of the vessels in Federal District Court. The cargo owners chose an American court in large part because the relevant American liability rules were more favorable than the Canadian rules. The District Court dismissed on grounds of *forum non conveniens*. The plaintiffs argued that dismissal was inappropriate because Canadian laws were less favorable to them. This Court nonetheless affirmed:

> "We have no occasion to enquire by what law the rights of the parties are governed, as we are of the opinion

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III, *infra*. We believe that it is necessary to discuss the *Gilbert* analysis in order to properly dispose of the cases.

The questions on which certiorari was granted are sufficiently broad to justify our discussion of the District Court's *Gilbert* analysis. However, even if the issues we discuss in Part III are not within the bounds of the questions with respect to which certiorari was granted, our consideration of these issues is not inappropriate. An order limiting the grant of certiorari does not operate as a jurisdictional bar. We may consider questions outside the scope of the limited order when resolution of those questions is necessary for the proper disposition of the case. See *Olmstead* v. *United States*, 277 U. S. 438 (1928); *McCandless* v. *Furlaud*, 293 U. S. 67 (1934); *Redrup* v. *New York*, 386 U. S. 767 (1967).

> that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy. . . . '[T]he court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.'" *Id.*, at 419–420 (quoting *Charter Shipping Co.* v. *Bowring, Jones & Tidy, Ltd.*, 281 U. S. 515, 517 (1930).

The Court further stated that "[t]here was no basis for the contention that the District Court abused its discretion." 285 U.S., at 423.

It is true that *Canada Malting* was decided before *Gilbert*, and that the doctrine of *forum non conveniens* was not fully crystallized until our decision in that case.[13] However, *Gilbert* in no way affects the validity of *Canada Malting*. In-

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[13] The doctrine of *forum non conveniens* has a long history. It originated in Scotland, see Braucher, The Inconvenient Federal Forum, 60 Harv. L. Rev. 908, 909–911 (1947), and became part of the common law of many States, see *id.*, at 911–912; Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Colum. L. Rev. 1 (1929). The doctrine was also frequently applied in federal admiralty actions. See, *e. g.*, *Canada Malting Co.* v. *Paterson Steamships, Ltd.*; see also Bickel, The Doctrine of Forum Non Conveniens As Applied in the Federal Courts in Matters of Admiralty, 35 Cornell L. Q. 12 (1949). In *Williams* v. *Green Bay & Western R. Co.*, 326 U. S. 549 (1946), the Court first indicated that motions to dismiss on grounds of *forum non conveniens* could be made in federal diversity actions. The doctrine became firmly established when *Gilbert* and *Koster* were decided one year later.

In previous *forum non conveniens* decisions, the Court has left unresolved the question whether under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), state or federal law of *forum non conveniens* applies in a diversity case. *Gilbert*, 330 U. S., at 509; *Koster*, 330 U. S., at 529; *Williams* v. *Green Bay & Western R. Co.*, *supra*, at 551, 558–559. The Court did not decide this issue because the same result would have been reached in each case under federal or state law. The lower courts in these cases reached the same conclusion: Pennsylvania and California law on *forum non conveniens* dismissals are virtually identical to federal law. See 630 F. 2d, at 158. Thus, here also, we need not resolve the *Erie* question.

deed, by holding that the central focus of the *forum non conveniens* inquiry is convenience, *Gilbert* implicitly recognized that dismissal may not be barred solely because of the possibility of an unfavorable change in law.[14] Under *Gilbert*, dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.[15] If substantial weight were given to the possibility of an unfavorable change in law, however, dismissal might be barred even where trial in the chosen forum was plainly inconvenient.

The Court of Appeals' decision is inconsistent with this Court's earlier *forum non conveniens* decisions in another respect. Those decisions have repeatedly emphasized the need to retain flexibility. In *Gilbert*, the Court refused to identify specific circumstances "which will justify or require either grant or denial of remedy." 330 U. S., at 508. Similarly, in *Koster*, the Court rejected the contention that where a trial would involve inquiry into the internal affairs of a foreign corporation, dismissal was always appropriate. "That is one, but only one, factor which may show convenience." 330 U. S., at 527. And in *Williams* v. *Green Bay & Western R. Co.*, 326 U. S. 549, 557 (1946), we stated that we would not lay down a rigid rule to govern discretion, and that "[e]ach case turns on its facts." If central emphasis were

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[14] See also *Williams* v. *Green Bay & Western R. Co.*, *supra*, at 555, n. 4 (citing with approval a Scottish case that dismissed an action on the ground of *forum non conveniens* despite the possibility of an unfavorable change in law).

[15] In other words, *Gilbert* held that dismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant or take advantage of favorable law. This is precisely the situation in which the Court of Appeals' rule would bar dismissal.

placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.

In fact, if conclusive or substantial weight were given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless. Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the *forum non conveniens* inquiry, dismissal would rarely be proper.

Except for the court below, every Federal Court of Appeals that has considered this question after *Gilbert* has held that dismissal on grounds of *forum non conveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery. See, *e. g.*, *Pain* v. *United Technologies Corp.*, 205 U. S. App. D. C. 229, 248–249, 637 F. 2d 775, 794–795 (1980); *Fitzgerald* v. *Texaco, Inc.*, 521 F. 2d 448, 453 (CA2 1975), cert. denied, 423 U. S. 1052 (1976); *Anastasiadis* v. *S.S. Little John*, 346 F. 2d 281, 283 (CA5 1965), cert. denied, 384 U. S. 920 (1966).[16] Several courts have relied expressly on *Canada Malting* to hold that the possibility of an unfavorable change of law should not, by itself, bar dismissal. See *Fitz-*

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[16] Cf. *Dahl* v. *United Technologies Corp.*, 632 F. 2d 1027, 1032 (CA3 1980) (dismissal affirmed where "Norwegian substantive law will predominate the trial of this case and the mere presence of a count pleaded under Connecticut law but which may have little chance of success does not warrant a different conclusion"). But see *DeMateos* v. *Texaco, Inc.*, 562 F. 2d 895, 899 (CA3 1977) (dictum) (principle that § 1404(a) transfer should not result in change in law is no less applicable to dismissal on grounds of *forum non conveniens*), cert. denied, 435 U. S. 904 (1978). The court below relied on the dictum in *DeMateos* in reaching its decision. See *infra*, at 253–254.

gerald v. *Texaco, Inc., supra; Anglo-American Grain Co.* v. *The S/T Mina D'Amico*, 169 F. Supp. 908 (ED Va. 1959).

The Court of Appeals' approach is not only inconsistent with the purpose of the *forum non conveniens* doctrine, but also poses substantial practical problems. If the possibility of a change in law were given substantial weight, deciding motions to dismiss on the ground of *forum non conveniens* would become quite difficult. Choice-of-law analysis would become extremely important, and the courts would frequently be required to interpret the law of foreign jurisdictions. First, the trial court would have to determine what law would apply if the case were tried in the chosen forum, and what law would apply if the case were tried in the alternative forum. It would then have to compare the rights, remedies, and procedures available under the law that would be applied in each forum. Dismissal would be appropriate only if the court concluded that the law applied by the alternative forum is as favorable to the plaintiff as that of the chosen forum. The doctrine of *forum non conveniens*, however, is designed in part to help courts avoid conducting complex exercises in comparative law. As we stated in *Gilbert*, the public interest factors point towards dismissal where the court would be required to "untangle problems in conflict of laws, and in law foreign to itself." 330 U. S., at 509.

Upholding the decision of the Court of Appeals would result in other practical problems. At least where the foreign plaintiff named an American manufacturer as defendant,[17] a court could not dismiss the case on grounds of *forum non*

[17] In fact, the defendant might not even have to be American. A foreign plaintiff seeking damages for an accident that occurred abroad might be able to obtain service of process on a foreign defendant who does business in the United States. Under the Court of Appeals' holding, dismissal would be barred if the law in the alternative forum were less favorable to the plaintiff—even though none of the parties are American, and even though there is absolutely no nexus between the subject matter of the litigation and the United States.

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conveniens where dismissal might lead to an unfavorable change in law. The American courts, which are already extremely attractive to foreign plaintiffs,[18] would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.[19]

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[18] First, all but 6 of the 50 American States—Delaware, Massachusetts, Michigan, North Carolina, Virginia, and Wyoming—offer strict liability. 1 CCH Prod. Liability Rep. § 4016 (1981). Rules roughly equivalent to American strict liability are effective in France, Belgium, and Luxembourg. West Germany and Japan have a strict liability statute for pharmaceuticals. However, strict liability remains primarily an American innovation. Second, the tort plaintiff may choose, at least potentially, from among 50 jurisdictions if he decides to file suit in the United States. Each of these jurisdictions applies its own set of malleable choice-of-law rules. Third, jury trials are almost always available in the United States, while they are never provided in civil law jurisdictions. G. Gloss, Comparative Law 12 (1979); J. Merryman, The Civil Law Tradition 121 (1969). Even in the United Kingdom, most civil actions are not tried before a jury. 1 G. Keeton, The United Kingdom: The Development of its Laws and Constitutions 309 (1955). Fourth, unlike most foreign jurisdictions, American courts allow contingent attorney's fees, and do not tax losing parties with their opponents' attorney's fees. R. Schlesinger, Comparative Law: Cases, Text, Materials 275–277 (3d ed. 1970); Orban, Product Liability: A Comparative Legal Restatement—Foreign National Law and the EEC Directive, 8 Ga. J. Int'l & Comp. L. 342, 393 (1978). Fifth, discovery is more extensive in American than in foreign courts. R. Schlesinger, *supra*, at 307, 310, and n. 33.

[19] In holding that the possibility of a change in law unfavorable to the plaintiff should not be given substantial weight, we also necessarily hold that the possibility of a change in law favorable to defendant should not be considered. Respondent suggests that Piper and Hartzell filed the motion to dismiss, not simply because trial in the United States would be inconvenient, but also because they believe the laws of Scotland are more favorable. She argues that this should be taken into account in the analysis of the private interests. We recognize, of course, that Piper and Hartzell may be engaged in reverse forum-shopping. However, this possibility ordinarily should not enter into a trial court's analysis of the private interests. If the defendant is able to overcome the presumption in favor of plaintiff by showing that trial in the chosen forum would be unnecessarily

The Court of Appeals based its decision, at least in part, on an analogy between dismissals on grounds of *forum non conveniens* and transfers between federal courts pursuant to § 1404(a). In *Van Dusen* v. *Barrack*, 376 U. S. 612 (1964), this Court ruled that a § 1404(a) transfer should not result in a change in the applicable law. Relying on dictum in an earlier Third Circuit opinion interpreting *Van Dusen*, the court below held that that principle is also applicable to a dismissal on *forum non conveniens* grounds. 630 F. 2d, at 164, and n. 51 (citing *DeMateos* v. *Texaco, Inc.*, 562 F. 2d, at 899). However, § 1404(a) transfers are different than dismissals on the ground of *forum non conveniens*.

Congress enacted § 1404(a) to permit change of venue between federal courts. Although the statute was drafted in accordance with the doctrine of *forum non conveniens*, see Revisor's Note, H. R. Rep. No. 308, 80th Cong., 1st Sess., A132 (1947); H. R. Rep. No. 2646, 79th Cong., 2d Sess., A127 (1946), it was intended to be a revision rather than a codification of the common law. *Norwood* v. *Kirkpatrick*, 349 U. S. 29 (1955). District courts were given more discretion to transfer under § 1404(a) than they had to dismiss on grounds of *forum non conveniens*. *Id.*, at 31–32.

The reasoning employed in *Van Dusen* v. *Barrack* is simply inapplicable to dismissals on grounds of *forum non conveniens*. That case did not discuss the common-law doctrine. Rather, it focused on "the construction and application" of § 1404(a). 376 U. S., at 613.[20] Emphasizing the re-

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burdensome, dismissal is appropriate—regardless of the fact that defendant may also be motivated by a desire to obtain a more favorable forum. Cf. *Kloeckner Reederei und Kohlenhandel* v. *A/S Hakedal*, 210 F. 2d 754, 757 (CA2) (defendant not entitled to dismissal on grounds of *forum non conveniens* solely because the law of the original forum is less favorable to him than the law of the alternative forum), cert. dism'd by stipulation, 348 U. S. 801 (1954).

[20] *Barrack* at least implicitly recognized that the rule it announced for transfer under § 1404(a) was not the common-law rule. It cited several de-

medial purpose of the statute, *Barrack* concluded that Congress could not have intended a transfer to be accompanied by a change in law. *Id.*, at 622. The statute was designed as a "federal housekeeping measure," allowing easy change of venue within a unified federal system. *Id.*, at 613. The Court feared that if a change in venue were accompanied by a change in law, forum-shopping parties would take unfair advantage of the relaxed standards for transfer. The rule was necessary to ensure the just and efficient operation of the statute.[21]

We do not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration in a *forum non conveniens* inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.[22] In these cases, however, the remedies that

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cisions under § 1404(a) in which lower courts had been "strongly inclined to protect plaintiffs against the risk that transfer might be accompanied by a prejudicial change in applicable state laws." 376 U. S., at 630, n. 26. These decisions frequently rested on the assumption that a change in law would have been unavoidable under common law *forum non conveniens*, but could be avoided under § 1404(a). See, *e. g.*, *Greve* v. *Gibraltar Enterprises, Inc.*, 85 F. Supp. 410, 414 (NM 1949).

[21] The United States Court of Appeals for the Second Circuit has expressly rejected the contention that rules governing transfers pursuant to § 1404(a) also govern *forum non conveniens* dismissals. *Schertenleib* v. *Traum*, 589 F. 2d 1156 (1978).

[22] At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction. *Gilbert*, 330 U.S., at 506–507. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute. Cf. *Phoenix Canada Oil Co.*

would be provided by the Scottish courts do not fall within this category. Although the relatives of the decedents may not be able to rely on a strict liability theory, and although their potential damages award may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly.

III

The Court of Appeals also erred in rejecting the District Court's *Gilbert* analysis. The Court of Appeals stated that more weight should have been given to the plaintiff's choice of forum, and criticized the District Court's analysis of the private and public interests. However, the District Court's decision regarding the deference due plaintiff's choice of forum was appropriate. Furthermore, we do not believe that the District Court abused its discretion in weighing the private and public interests.

A

The District Court acknowledged that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum. It held, however, that the presumption applies with less force when the plaintiff or real parties in interest are foreign.

The District Court's distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified. In *Koster*, the Court indicated that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. 330 U. S., at 524.[23] When the home forum has

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Ltd. v. *Texaco, Inc.*, 78 F. R. D. 445 (Del. 1978) (court refuses to dismiss, where alternative forum is Ecuador, it is unclear whether Ecuadorean tribunal will hear the case, and there is no generally codified Ecuadorean legal remedy for the unjust enrichment and tort claims asserted).

[23] In *Koster*, we stated that "[i]n any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will

been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.[24]

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normally outweigh the inconvenience the defendant may have shown." 330 U. S., at 524. See also *Swift & Co. Packers* v. *Compania Colombiana del Caribe*, 339 U. S. 684, 697 (1950) ("suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners"); *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U. S., at 421 ("[t]he rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower federal courts").

As the District Court correctly noted in its opinion, 479 F. Supp., at 731; see also n. 10, *supra*, the lower federal courts have routinely given less weight to a foreign plaintiff's choice of forum. See, *e. g.*, *Founding Church of Scientology* v. *Verlag*, 175 U. S. App. D. C. 402, 408, 536 F. 2d 429, 435 (1976); *Paper Operations Consultants Int'l, Ltd.* v. *SS Hong Kong Amber*, 513 F. 2d 667, 672 (CA9 1975); *Fitzgerald* v. *Texaco, Inc.*, 521 F. 2d 448, 451 (CA2 1975), cert. denied, 423 U. S. 1052 (1976); *Mobil Tankers Co.* v. *Mene Grande Oil Co.*, 363 F. 2d 611, 614 (CA3), cert. denied, 385 U. S. 945 (1966); *Ionescu* v. *E. F. Hutton & Co. (France)*, 465 F. Supp. 139 (SDNY 1979); *Michell* v. *General Motors Corp.*, 439 F. Supp. 24, 27 (ND Ohio 1977).

A citizen's forum choice should not be given dispositive weight, however. See *Pain* v. *United Technologies Corp.*, 205 U. S. App. D. C. 229, 252–253, 637 F. 2d 775, 796–797 (1980); *Mizokami Bros. of Arizona, Inc.* v. *Baychem Corp.*, 556 F. 2d 975 (CA9 1977), cert. denied, 434 U. S. 1035 (1978). Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.

[24] See *Pain* v. *United Technologies Corp.*, *supra*, at 253, 637 F. 2d, at 797 (citizenship and residence are proxies for convenience); see also Note, Forum Non Conveniens and American Plaintiffs in the Federal Courts, 47 U. Chi. L. Rev. 373, 382–383 (1980).

Respondent argues that since plaintiffs will ordinarily file suit in the ju-

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The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. *Gilbert*, 330 U. S., at 511–512; *Koster*, 330 U. S., at 531. Here, the Court of Appeals expressly acknowledged that the standard of review was one of abuse of discretion. In examining the District Court's analysis of the public and private interests, however, the Court of Appeals seems to have lost sight of this rule, and substituted its own judgment for that of the District Court.

(1)

In analyzing the private interest factors, the District Court stated that the connections with Scotland are "overwhelming." 479 F. Supp., at 732. This characterization may be somewhat exaggerated. Particularly with respect to the question of relative ease of access to sources of proof, the private interests point in both directions. As respondent emphasizes, records concerning the design, manufacture, and testing of the propeller and plane are located in the United States. She would have greater access to sources of proof relevant to her strict liability and negligence theories if trial were held here.[25] However, the District Court did not act

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risdiction that offers the most favorable law, establishing a strong presumption in favor of both home and foreign plaintiffs will ensure that defendants will always be held to the highest possible standard of accountability for their purported wrongdoing. However, the deference accorded a plaintiff's choice of forum has never been intended to guarantee that the plaintiff will be able to select the law that will govern the case. See *supra*, at 247–250.

[25] In the future, where similar problems are presented, district courts might dismiss subject to the condition that defendant corporations agree to provide the records relevant to the plaintiff's claims.

unreasonably in concluding that fewer evidentiary problems would be posed if the trial were held in Scotland. A large proportion of the relevant evidence is located in Great Britain.

The Court of Appeals found that the problems of proof could not be given any weight because Piper and Hartzell failed to describe with specificity the evidence they would not be able to obtain if trial were held in the United States. It suggested that defendants seeking *forum non conveniens* dismissal must submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum. Such detail is not necessary.[26] Piper and Hartzell have moved for dismissal precisely because many crucial witnesses are located beyond the reach of compulsory process, and thus are difficult to identify or interview. Requiring extensive investigation would defeat the purpose of their motion. Of course, defendants must provide enough information to enable the District Court to balance the parties' interests. Our examination of the record convinces us that sufficient in-

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[26] The United States Court of Appeals for the Second Circuit has expressly rejected such a requirement. *Fitzgerald* v. *Texaco, Inc.*, *supra*, at 451, n. 3. In other cases, dismissals have been affirmed despite the failure to provide detailed affidavits. See *Farmanfarmaian* v. *Gulf Oil Corp.*, 437 F. Supp. 910, 924 (SDNY 1977), aff'd., 588 F. 2d 880 (CA2 1978). And in a decision handed down two weeks after the decision in this case, another Third Circuit panel affirmed a dismissal without mentioning such a requirement. See *Dahl* v. *United Technologies Corp.*, 632 F. 2d 1027 (1980).

The Court of Appeals apparently relied on an analogy to motions to transfer under 28 U. S. C. § 1404(a). 630 F. 2d, at 160–161. It cited *Marbury-Pattillo Construction Co.* v. *Bayside Warehouse Co.*, 490 F. 2d 155, 158 (CA5 1974), and *Texas Gulf Sulphur Co.* v. *Ritter*, 371 F. 2d 145, 148 (CA10 1967), which suggest an affidavit requirement in the § 1404(a) context. As we have explained, however, dismissals on grounds of *forum non conveniens* and § 1404(a) transfers are not directly comparable. See *supra*, at 253–254.

formation was provided here. Both Piper and Hartzell submitted affidavits describing the evidentiary problems they would face if the trial were held in the United States.[27]

The District Court correctly concluded that the problems posed by the inability to implead potential third-party defendants clearly supported holding the trial in Scotland. Joinder of the pilot's estate, Air Navigation, and McDonald is crucial to the presentation of petitioners' defense. If Piper and Hartzell can show that the accident was caused not by a design defect, but rather by the negligence of the pilot, the plane's owners, or the charter company, they will be relieved of all liability. It is true, of course, that if Hartzell and Piper were found liable after a trial in the United States, they could institute an action for indemnity or contribution against these parties in Scotland. It would be far more convenient, however, to resolve all claims in one trial. The Court of Appeals rejected this argument. Forcing petitioners to rely on actions for indemnity or contributions would be "burdensome" but not "unfair." 630 F. 2d, at 162. Finding that trial in the plaintiff's chosen forum would be burdensome, however, is sufficient to support dismissal on grounds of *forum non conveniens*.[28]

(2)

The District Court's review of the factors relating to the public interest was also reasonable. On the basis of its

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[27] See Affidavit of Ronald C. Scott, App. to Pet. for Cert. of Hartzell Propeller, Inc., A75; Affidavit of Charles J. McKelvey, App. to Pet. for Cert. of Piper Aircraft Co. 1f. The affidavit provided to the District Court by Piper states that it would call the following witnesses: the relatives of the decedents; the owners and employees of McDonald; the persons responsible for the training and licensing of the pilot; the persons responsible for servicing and maintaining the aircraft; and two or three of its own employees involved in the design and manufacture of the aircraft.

[28] See *Pain* v. *United Technologies Corp.*, 205 U. S. App. D. C., at 244, 637 F. 2d, at 790 (relying on similar argument in approving dismissal of action arising out of helicopter crash that took place in Norway).

choice-of-law analysis, it concluded that if the case were tried in the Middle District of Pennsylvania, Pennsylvania law would apply to Piper and Scottish law to Hartzell. It stated that a trial involving two sets of laws would be confusing to the jury. It also noted its own lack of familiarity with Scottish law. Consideration of these problems was clearly appropriate under *Gilbert;* in that case we explicitly held that the need to apply foreign law pointed towards dismissal.[29] The Court of Appeals found that the District Court's choice-of-law analysis was incorrect, and that American law would apply to both Hartzell and Piper. Thus, lack of familiarity with foreign law would not be a problem. Even if the Court of Appeals' conclusion is correct, however, all other public interest factors favored trial in Scotland.

Scotland has a very strong interest in this litigation. The accident occurred in its airspace. All of the decedents were Scottish. Apart from Piper and Hartzell, all potential plaintiffs and defendants are either Scottish or English. As we stated in *Gilbert*, there is "a local interest in having localized controversies decided at home." 330 U. S., at 509. Respondent argues that American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products, and that additional deterrence might be obtained if Piper and Hartzell were tried in the United States, where they could be sued on the basis of both negligence and strict liability. However, the incremental deterrence that would be gained if this trial were held in an

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[29] Many *forum non conveniens* decisions have held that the need to apply foreign law favors dismissal. See, *e. g.*, *Calavo Growers of California* v. *Belgium*, 632 F. 2d 963, 967 (CA2 1980), cert. denied, 449 U. S. 1084 (1981); *Schertenleib* v. *Traum*, 589 F. 2d, at 1165. Of course, this factor alone is not sufficent to warrant dismissal when a balancing of all relevant factors shows that the plaintiff's chosen forum is appropriate. See, *e. g.*, *Founding Church of Scientology* v. *Verlag*, 175 U. S. App. D. C., at 409, 536 F. 2d, at 436; *Burt* v. *Isthmus Development Co.*, 218 F. 2d 353, 357 (CA5), cert. denied, 349 U. S. 922 (1955).

American court is likely to be insignificant. The American interest in this accident is simply not sufficient to justify the enormous commitment of judical time and resources that would inevitably be required if the case were to be tried here.

IV

The Court of Appeals erred in holding that the possibility of an unfavorable change in law bars dismissal on the ground of *forum non conveniens*. It also erred in rejecting the District Court's *Gilbert* analysis. The District Court properly decided that the presumption in favor of the respondent's forum choice applied with less than maximum force because the real parties in interest are foreign. It did not act unreasonably in deciding that the private interests pointed towards trial in Scotland. Nor did it act unreasonably in deciding that the public interests favored trial in Scotland. Thus, the judgment of the Court of Appeals is

Reversed.

JUSTICE POWELL took no part in the decision of these cases.

JUSTICE O'CONNOR took no part in the consideration or decision of these cases.

JUSTICE WHITE, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion. However, like JUSTICE BRENNAN and JUSTICE STEVENS, I would not proceed to deal with the issues addressed in Part III. To that extent, I am in dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, dissenting.

In No. 80–848, only one question is presented for review to this Court:

> "Whether, in an action in federal district court brought by foreign plaintiffs against American defendants, the plaintiffs may defeat a motion to dismiss on the ground of

forum non conveniens merely by showing that the substantive law that would be applied if the case were litigated in the district court is more favorable to them than the law that would be applied by the courts of their own nation." Pet. for Cert. in No. 80–848, p. i.

In No. 80–883, the Court limited its grant of certiorari, see 450 U. S. 909, to the same question:

> "Must a motion to dismiss on grounds of *forum non conveniens* be denied whenever the law of the alternate forum is less favorable to recovery than that which would be applied by the district court?" Pet. for Cert. in No. 80–883, p. i.

I agree that this question should be answered in the negative. Having decided that question, I would simply remand the case to the Court of Appeals for further consideration of the question whether the District Court correctly decided that Pennsylvania was not a convenient forum in which to litigate a claim against a Pennsylvania company that a plane was defectively designed and manufactured in Pennsylvania.

Syllabus

WIDMAR ET AL. *v.* VINCENT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80–689. Argued October 6, 1981—Decided December 8, 1981

The University of Missouri at Kansas City, a state university, makes its facilities generally available for the activities of registered student groups. A registered student religious group that had previously received permission to conduct its meetings in University facilities was informed that it could no longer do so because of a University regulation prohibiting the use of University buildings or grounds "for purposes of religious worship or religious teaching." Members of the group then brought suit in Federal District Court, alleging that the regulation violated, *inter alia*, their rights to free exercise of religion and freedom of speech under the First Amendment. The District Court upheld the regulation as being not only justified, but required, by the Establishment Clause of the First Amendment. The Court of Appeals reversed, viewing the regulation as a content-based discrimination against religious speech, for which it could find no compelling justification, and holding that the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds.

Held: The University's exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral. Pp. 267–277.

(a) Having created a forum generally open for use by student groups, the University, in order to justify discriminatory exclusion from such forum based on the religious content of a group's intended speech, must satisfy the standard of review appropriate to content-based exclusions; *i. e.*, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Pp. 267–270.

(b) Although the University's interest in complying with its constitutional obligations under the Establishment Clause may be characterized as compelling, an "equal access" policy would not be incompatible with that Clause. A policy will not offend the Establishment Clause if it can pass the following three-pronged test: (1) It has a secular legislative purpose; (2) its principal or primary effect would be neither to advance nor to inhibit religion; and (3) it does not foster "an excessive government entanglement with religion." Here, it is conceded that an "equal ac-

cess" policy would meet the first and third prongs of the test. In the context of this case and in the absence of any evidence that religious groups will dominate the University's forum, the advancement of religion would not be the forum's "primary effect." An "equal access" policy would therefore satisfy the test's second prong as well. Pp. 270–275.

(c) The State's interest in achieving greater separation of church and State than is already ensured under the Establishment Clause is not sufficiently "compelling" to justify content-based discrimination against religious speech of the student group in question. Pp. 275–276.

635 F. 2d 1310, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 277. WHITE, J., filed a dissenting opinion, *post*, p. 282.

Ted D. Ayres argued the cause for petitioners. With him on the brief was *Jackson A. Wright*.

James M. Smart, Jr., argued the cause for respondents. With him on the brief was *Michael K. Whitehead*.*

JUSTICE POWELL delivered the opinion of the court.

This case presents the question whether a state university, which makes its facilities generally available for the activities

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*Briefs of *amici curiae* urging reversal were filed by *Jerold Blumoff* and *Marc D. Stern* for the American Jewish Congress; and by *Justin J. Finger*, *Jeffrey P. Sinensky*, and *Meyer Eisenberg* for the Anti-Defamation League of B'nai B'rith.

Briefs of *amici curiae* urging affirmance were filed by *Joel H. Paget* for the Association for the Coordination of University Religious Affairs; by *Wilkes C. Robinson* and *Jane E. Nelson* for Bible Study; by *Edward McGlynn Gaffney, Jr.*, and *Kenneth F. Ripple* for the Center for Constitutional Studies et al.; by *Barry A. Fisher* for the Holy Spirit Association for the Unification of World Christianity; by *Nathan Lewin*, *Daniel D. Chazin*, and *Dennis Rapps* for the National Jewish Commission on Law and Public Affairs; and by *Wilfred R. Caron* for the United States Catholic Conference.

Briefs of *amici curiae* were filed by *Earl W. Trent, Jr.*, for the Baptist Joint Committee on Public Affairs; by *J. Robert Brame*, *John W. Whitehead*, and *James J. Knicely* for the National Association of Evangelicals; and by *Donald L. Reidhaar* for the Regents of the University of California.

of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.

I

It is the stated policy of the University of Missouri at Kansas City[1] to encourage the activities of student organizations. The University officially recognizes over 100 student groups. It routinely provides University facilities for the meetings of registered organizations. Students pay an activity fee of $41 per semester (1978–1979) to help defray the costs to the University.

From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities.[2] In 1977, however, the University informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation, adopted by the Board of Curators in 1972, that prohibits the use of University buildings or grounds "for purposes of religious worship or religious teaching."[3]

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[1] The University of Missouri at Kansas City (UMKC) is one of four campuses of the University of Missouri, an institution of the State of Missouri.

[2] Cornerstone is an organization of evangelical Christian students from various denominational backgrounds. According to an affidavit filed in 1977, "perhaps twenty students . . . participate actively in Cornerstone and form the backbone of the campus organization." Affidavit of Florian Chess (Sept. 29, 1977), quoted in *Chess* v. *Widmar*, 480 F. Supp. 907, 911 (WD Mo. 1979). Cornerstone held its on-campus meetings in classrooms and in the student center. These meetings were open to the public and attracted up to 125 students. A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences.

[3] The pertinent regulations provide as follows:

"4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. . . . The general prohibition against use of University buildings and grounds for religious worship

Eleven University students, all members of Cornerstone, brought suit to challenge the regulation in the Federal District Court for the Western District of Missouri.[4] They alleged that the University's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

Upon cross-motions for summary judgment, the District Court upheld the challenged regulation. *Chess* v. *Widmar*, 480 F. Supp. 907 (1979). It found the regulation not only justified, but required, by the Establishment Clause of the Federal Constitution. *Id.*, at 916. Under *Tilton* v. *Richardson*, 403 U. S. 672 (1971), the court reasoned, the State

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or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. . . .

"4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. Special rules and procedures shall be established for each such chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group."

There is no chapel on the campus of UMKC. The nearest University chapel is at the Columbia campus, approximately 125 miles east of UMKC.

Although the University had routinely approved Cornerstone meetings before 1977, the District Court found that University officials had never "authorized a student organization to utilize a University facility for a meeting where they had full knowledge that the purposes of the meeting include[d] religious worship or religious teaching." *Chess* v. *Widmar*, *supra*, at 910.

[4] Respondent Clark Vincent and Florian Chess, a named plaintiff in the action in the District Court, were among the students who initiated the action on October 13, 1977. Named as defendants were the petitioner Gary Widmar, the Dean of Students at UMKC, and the University's Board of Curators.

could not provide facilities for religious use without giving prohibited support to an institution of religion. 480 F. Supp., at 915–916. The District Court rejected the argument that the University could not discriminate against religious speech on the basis of its content. It found religious speech entitled to less protection than other types of expression. *Id.*, at 918.

The Court of Appeals for the Eighth Circuit reversed. *Chess* v. *Widmar*, 635 F. 2d 1310 (1980). Rejecting the analysis of the District Court, it viewed the University regulation as a content-based discrimination against religious speech, for which it could find no compelling justification. *Id.*, at 1315–1320. The court held that the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds. *Id.*, at 1317. According to the Court of Appeals, the "primary effect" of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' "'social and cultural awareness as well as [their] intellectual curiosity.'" *Ibid.* (quoting from the University bulletin's description of the student activities program, reprinted in *id.*, at 1312, n. 1).

We granted certiorari. 450 U. S. 909. We now affirm.

II

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.[5] The Constitution

[5] This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum. See generally *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972); *Cox* v. *Louisiana*, 379 U. S. 536 (1965). "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" *Healy* v. *James*, 408 U. S. 169, 180 (1972). Moreover, the capacity of a

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forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place. See, *e. g.*, *Madison Joint School District* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 175, and n. 8 (1976) (although a State may conduct business in private session, "[w]here the State has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 555–559 (1975) (because municipal theater was a public forum, city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints).

The University's institutional mission, which it describes as providing a "*secular* education" to its students, Brief for Petitioners 44, does not exempt its actions from constitutional scrutiny. With respect to persons entitled to be there, our cases leave no doubt that the First Amendment

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group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.*, at 181–182. We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.*, at 181, 184.

At the same time, however, our cases have recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Tinker* v. *Des Moines Independent School District*, 393 U. S. 503, 506 (1969). We continue to adhere to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.

rights of speech and association extend to the campuses of state universities. See, *e. g.*, *Healy* v. *James*, 408 U. S. 169, 180 (1972); *Tinker* v. *Des Moines Independent School District*, 393 U. S. 503, 506 (1969); *Shelton* v. *Tucker*, 364 U. S. 479, 487 (1960).

Here UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. See, *e. g.*, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Saia* v. *New York*, 334 U. S. 558 (1948).[6] In order to justify discrimina-

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[6] The dissent argues that "religious worship" is not speech generally protected by the "free speech" guarantee of the First Amendment and the "equal protection" guarantee of the Fourteenth Amendment. If "religious worship" were protected "speech," the dissent reasons, "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." *Post*, at 284. This is a novel argument. The dissent does not deny that speech *about* religion is speech entitled to the general protections of the First Amendment. See *post*, at 283–284, and n. 2, 286. It does not argue that descriptions of religious experiences fail to qualify as "speech." Nor does it repudiate last Term's decision in *Heffron* v. *International Society for Krishna Consciousness, Inc.*, which assumed that religious appeals to nonbelievers constituted protected "speech." Rather, the dissent seems to attempt a distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious "speech act[s]," *post*, at 285, constituting "worship." There are at least three difficulties with this distinction.

First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," *post*, at 283, cease to be "singing, teaching, and reading"—all apparently forms of "speech," despite their religious subject matter—and become unprotected "worship."

Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Cf. *Fowler* v. *Rhode Island*, 345 U. S. 67, 70 (1953). Merely to draw the distinction would require the university—and ultimately the courts—to

tory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. See *Carey* v. *Brown*, 447 U. S. 455, 461, 464–465 (1980).[7]

III

In this case the University claims a compelling interest in maintaining strict separation of church and State. It derives this interest from the "Establishment Clauses" of both the Federal and Missouri Constitutions.

A

The University first argues that it cannot offer its facilities to religious groups and speakers on the terms available to

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inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases. *E. g.*, *Walz* v. *Tax Comm'n*, 397 U. S. 664, 668 (1970).

Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. See *post*, at 284–285. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, see *Heffron*, *supra*, than for religious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.

[7] See also *Healy* v. *James*, *supra*, at 184:

"It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which . . . may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."

other groups without violating the Establishment Clause of the Constitution of the United States.[8] We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an "equal access" policy would be incompatible with this Court's Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the [policy] must not foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971). See *Committee for Public Education* v. *Regan*, 444 U. S. 646, 653 (1980); *Roemer* v. *Maryland Public Works Bd.*, 426 U. S. 736, 748 (1976).

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech,[9] would have a secular purpose[10] and would

[8] "Congress shall make no law respecting an establishment of religion . . . ." U. S. Const., Amdt. 1. The Establishment Clause has been made applicable to the States through the Fourteenth Amendment. See *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940).

[9] As the dissent emphasizes, the Establishment Clause requires the State to distinguish between "religious" speech—speech, undertaken or approved by the State, the primary effect of which is to support an establishment of religion—and "nonreligious" speech—speech, undertaken or approved by the State, the primary effect of which is not to support an establishment of religion. This distinction is required by the plain text of the Constitution. It is followed in our cases. *E. g.*, *Stone* v. *Graham*, 449 U. S. 39 (1980). The dissent attempts to equate this distinction with its view of an alleged constitutional difference between religious "speech" and religious "worship." See *post*, at 285, and n. 3. We think that the distinction advanced by the dissent lacks a foundation in either the Constitution or in our cases, and that it is judicially unmanageable.

[10] It is the avowed purpose of UMKC to provide a forum in which students can exchange ideas. The University argues that use of the forum

avoid entanglement with religion.[11] But the District Court concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion.[12]

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for religious speech would undermine this secular aim. But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association.

Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others. See, *e. g.*, *McCollum* v. *Board of Education*, 333 U. S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

[11] We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech." See *Chess* v. *Widmar*, 635 F. 2d 1310, 1318 (CA8 1980). Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *O'Hair* v. *Andrus*, 198 U. S. App. D. C. 198, 203, 613 F. 2d 931, 936 (1979) (footnote omitted); see L. Tribe, American Constitutional Law § 14–6 (1978). There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

[12] In finding that an "equal access" policy would have the primary effect of advancing religion, the District Court in this case relied primarily on *Tilton* v. *Richardson*, 403 U. S. 672 (1971). In *Tilton* this Court upheld the grant of federal financial assistance to sectarian colleges for secular purposes, but circumscribed the terms of the grant to ensure its constitutionality. Although Congress had provided that federally subsidized buildings could not be used for sectarian or religious worship for 20 years, the Court considered this restriction insufficient: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion." *Id.*, at 683. From this statement the District Court derived the proposition that state funds may not be used to provide or maintain buildings used by religious organizations.

The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. See *Healy* v. *James*, 408 U. S. 169 (1972).[13] In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum's likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion. *Committee for Public Education* v. *Nyquist*, 413 U. S. 756,

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We do not believe that *Tilton* can be read so broadly. In *Tilton* the Court was concerned that a sectarian institution might convert federally funded buildings to religious uses or otherwise stamp them with the imprimatur of religion. But nothing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others. See, *e. g.*, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981); *Saia* v. *New York*, 334 U. S. 558 (1948).

[13] This case is different from cases in which religious groups claim that the denial of facilities *not* available to other groups deprives them of their rights under the Free Exercise Clause. Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case. Accordingly, we need not inquire into the extent, if any, to which free exercise interests are infringed by the challenged University regulation. Neither do we reach the questions that would arise if state accommodation of free exercise and free speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause.

771 (1973); see, *e. g.*, *Roemer* v. *Maryland Public Works Bd.*, 426 U. S. 736 (1976); *Hunt* v. *McNair*, 413 U. S. 734 (1973); *McGowan* v. *Maryland*, 366 U. S. 420, 422 (1961).

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . to religious goals" than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities. 635 F. 2d, at 1317.[14]

Second, the forum is available to a broad class of nonreligious as well as religious speakers; there are over 100 recognized student groups at UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect. See, *e. g.*, *Wolman* v. *Walter*, 433 U. S. 229, 240–241 (1977); *Committee for Public Education* v. *Nyquist*, *supra*, at 781–782, and n. 38. If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire depart-

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[14] University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion. See *Tilton* v. *Richardson*, *supra*, at 685–686. The University argues that the Cornerstone students themselves admitted in affidavits that "[s]tudents know that if something is on campus, then it is a student organization, and they are more likely to feel comfortable attending a meeting." Affidavit of Florian Frederick Chess, App. 18, 19. In light of the large number of groups meeting on campus, however, we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place. The University's student handbook already notes that the University's name will not "be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members." 1980–1981 UMKC Student Handbook 25.

ments, or have its public sidewalk kept in repair." *Roemer* v. *Maryland Public Works Bd.*, *supra*, at 747 (plurality opinion); quoted in *Committee for Public Education* v. *Regan*, 444 U. S., at 658, n. 6.[15] At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

B

Arguing that the State of Missouri has gone further than the Federal Constitution in proscribing indirect state support for religion,[16] the University claims a compelling interest in complying with the applicable provisions of the Missouri Constitution.[17]

The Missouri courts have not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and nonreligious speech, would offend the State Constitution. We need not, however, determine how the Missouri courts would decide this issue. It is also unnecessary for us to decide whether, under the Supremacy Clause,[18] a state interest, derived from its own constitution, could ever outweigh free

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[15] This Court has similarly rejected "the recurrent argument that all aid [to parochial schools] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt* v. *McNair*, 413 U. S. 734, 743 (1973).

[16] See, *e. g.*, *Americans United* v. *Rogers*, 538 S. W. 2d 711, 720 (Mo.) (en banc) (holding Missouri Constitution requires stricter separation of church and State than does Federal Constitution), cert. denied, 429 U. S. 1029 (1976); *Harfst* v. *Hoegen*, 349 Mo. 808, 815–816, 163 S. W. 2d 609, 613–614 (Mo. 1942) (en banc) (same).

[17] See Mo. Const., Art. 1, §§ 6, 7; Art. 9, § 8. In *Luetkemeyer* v. *Kaufmann*, 364 F. Supp. 376 (WD Mo. 1973), aff'd, 419 U. S. 888 (1974), the District Court found Missouri had a compelling interest in compliance with its own Constitution.

[18] U. S. Const., Art. VI, cl. 2.

speech interests protected by the First Amendment. We limit our holding to the case before us.

On one hand, respondents' First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. See, *e. g.*, *Carey* v. *Brown*, 447 U. S. 455 (1980); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972). On the other hand, the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.

IV

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations.[19] Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources or "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy* v. *New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in result); see *University of California Regents* v. *Bakke*, 438 U. S. 265, 312–313 (1978) (opinion of POWELL, J., announcing the judgment of the Court).[20] Fi-

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[19] See, *e. g.*, *Grayned* v. *City of Rockford*, 408 U. S. 104, 116 (1972) ("The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable,'" quoting Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1042 (1969)).

[20] In his opinion concurring in the judgment, *post*, at 277–287, JUSTICE STEVENS expresses concern that use of the terms "compelling state

nally, we affirm the continuing validity of cases, *e. g.*, *Healy* v. *James*, 408 U. S., at 188–189, that recognize a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.

For this reason, the decision of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, concurring in the judgment.

As the Court recognizes, every university must "make academic judgments as to how best to allocate scarce resources," *ante*, at 276. The Court appears to hold, however, that those judgments must "serve a compelling state interest" whenever they are based, even in part, on the content of speech. *Ante*, at 269–270. This conclusion apparently flows from the Court's suggestion that a student activities program—from which the public may be excluded, *ante*, at 267–268, n. 5—must be managed as though it were a "public forum."[1] In my opinion, the use of the terms "compelling

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interest" and "public forum" may "undermine the academic freedom of public universities." As the text above makes clear, this concern is unjustified. See also n. 5, *supra*. Our holding is limited to the context of a public forum created by the University itself.

[1] As stated by the Court, "[i]n order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions." *Ante*, at 269–270. See also *ante*, this page, n. 20 ("Our holding is limited to the context of a public forum created by the University itself").

state interest" and "public forum" to analyze the question presented in this case may needlessly undermine the academic freedom of public universities.

Today most major colleges and universities are operated by public authority. Nevertheless, their facilities are not open to the public in the same way that streets and parks are. University facilities—private or public—are maintained primarily for the benefit of the student body and the faculty. In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials. They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written. In addition, in encouraging students to participate in extracurricular activities, they necessarily make decisions concerning the content of those activities.

Because every university's resources are limited, an educational institution must routinely make decisions concerning the use of the time and space that is available for extracurricular activities. In my judgment, it is both necessary and appropriate for those decisions to evaluate the content of a proposed student activity. I should think it obvious, for example, that if two groups of 25 students requested the use of a room at a particular time—one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet—the First Amendment would not require that the room be reserved for the group that submitted its application first. Nor do I see why a university should have to establish a "compelling state interest" to defend its decision to permit one group to use the facility and not the other. In my opinion, a university should be allowed to decide for itself whether a program that illuminates the genius of Walt Disney should be given precedence over one that may duplicate material adequately covered in the classroom. Judgments of

this kind should be made by academicians, not by federal judges,[2] and their standards for decision should not be encumbered with ambiguous phrases like "compelling state interest."[3]

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[2] In *Sweezy* v. *New Hampshire*, 354 U. S. 234, Justice Frankfurter forcefully spoke of "the grave harm resulting from governmental intrusion into the intellectual life of a university . . . ." *Id.*, at 261 (concurring in result). Justice Frankfurter quoted with approval portions of an address by T. H. Huxley:

"'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Id.*, at 263.

Although these comments were not directed at a public university's concern with extracurricular activities, it is clear that the "atmosphere" of a university includes such a critical aspect of campus life. See also *University of California Regents* v. *Bakke*, 438 U. S. 265, 312 (opinion of POWELL, J.) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment"); Note, Academic Freedom and Federal Regulation of University Hiring, 92 Harv. L. Rev. 879 (1979). Cf. Van Alstyne, The Specific Theory of Academic Freedom and the General Issue of Civil Liberty, reprinted in The Concept of Academic Freedom 59, 77–81 (E. Pincoffs ed. 1972).

[3] In *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S. 173, JUSTICE BLACKMUN expressed concern with

"what seems to be a continuing tendency in this Court to use as tests such easy phrases as 'compelling [state] interest' and 'least drastic [or restrictive] means.' I have never been able fully to appreciate just what a 'compelling state interest' is. If it means 'convincingly controlling,' or 'incapable of being overcome' upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, 'least drastic means' is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." *Id.*, at 188–189 (concurring opinion) (citation omitted).

Thus, I do not subscribe to the view that a public university has no greater interest in the content of student activities than the police chief has in the content of a soapbox oration on Capitol Hill. A university legitimately may regard some subjects as more relevant to its educational mission than others. But the university, like the police officer, may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted. If a state university is to deny recognition to a student organization—or is to give it a lesser right to use school facilities than other student groups—it must have a valid reason for doing so. *Healy* v. *James*, 408 U. S. 169.[4]

In this case I agree with the Court that the University has not established a sufficient justification for its refusal to allow the Cornerstone group to engage in religious worship on the campus. The primary reason advanced for the discriminatory treatment is the University's fear of violating the Establishment Clause. But since the record discloses no danger

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[4] In *Healy*, the Court stated:

"The opinions below also assumed that petitioners had the burden of showing entitlement to recognition by the College. While petitioners have not challenged the procedural requirement that they file an application in conformity with the rules of the College, they do question the view of the courts below that final rejection could rest on their failure to convince the administration that their organization was unaffiliated with the National [Students for a Democratic Society]. For reasons to be stated later in this opinion, we do not consider the issue of affiliation to be a controlling one. But, apart from any particular issue, once petitioners had filed an application in conformity with the requirements, the burden was upon the College administration to justify its decision of rejection. It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action." 408 U. S., at 183–184 (footnotes and citations omitted).

that the University will appear to sponsor any particular religion, and since student participation in the Cornerstone meetings is entirely voluntary, the Court properly concludes that the University's fear is groundless. With that justification put to one side, the University has not met the burden that is imposed on it by *Healy*.

Nor does the University's reliance on the Establishment Clause of the Missouri State Constitution provide a sufficient justification for the discriminatory treatment in this case.[5] As I have said, I believe that the University may exercise a measure of control over the agenda for student use of school facilities, preferring some subjects over others, without needing to identify so-called "compelling state interests." Quite obviously, however, the University could not allow a group of Republicans or Presbyterians to meet while denying Democrats or Mormons the same privilege.[6] It seems apparent that the policy under attack would allow groups of young philosophers to meet to discuss their skepticism that a Supreme Being exists, or a group of political scientists to meet to debate the accuracy of the view that religion is the "opium of the people." If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group desiring to express a belief in God must also be permitted. The fact that their expression of faith includes ceremonial conduct is not, in my opinion, a sufficient reason for suppressing their discussion entirely.

Accordingly, although I do not endorse the Court's reasoning, I concur in its judgment.

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[5] The University's asserted determination to keep Church and State completely separate, pursuant to the alleged dictates of the Missouri Constitution, is not without qualification. The very regulations at issue provide that "[n]o regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. . . ." See *ante*, at 266, n. 3.

[6] See Farber, Content Regulation and the First Amendment: A Revisionist View, 68 Geo. L. J. 727 (1980).

JUSTICE WHITE, dissenting.

In affirming the decision of the Court of Appeals, the majority rejects petititoners' argument that the Establishment Clause of the Constitution prohibits the use of university buildings for religious purposes. A state university may permit its property to be used for purely religious services without violating the First and Fourteenth Amendments. With this I agree. See *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 813 (1973) (WHITE, J., dissenting); *Lemon* v. *Kurtzman*, 403 U. S. 602, 661 (1971) (opinion of WHITE, J.). The Establishment Clause, however, sets limits only on what the State may do with respect to religious organizations; it does not establish what the State is *required* to do. I have long argued that Establishment Clause limits on state action which incidentally aids religion are not as strict as the Court has held. The step from the permissible to the necessary, however, is a long one. In my view, just as there is room under the Religion Clauses for state policies that may have some beneficial effect on religion, there is also room for state policies that may incidentally burden religion. In other words, I believe the States to be a good deal freer to formulate policies that affect religion in divergent ways than does the majority. See *Sherbert* v. *Verner*, 374 U. S. 398, 422–423 (1963) (Harlan, J., dissenting). The majority's position will inevitably lead to those contradictions and tensions between the Establishment and Free Exercise Clauses warned against by Justice Stewart in *Sherbert* v. *Verner*, *supra*, at 416.

The University regulation at issue here provides in pertinent part:

> "No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or non-student groups. Student congregations of local

> churches or of recognized denominations or sects, although not technically recognized campus groups, may use the facilities . . . under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching."

Although there may be instances in which it would be difficult to determine whether a religious group used university facilities for "worship" or "religious teaching," rather than for secular ends, this is not such a case. The regulation was applied to respondents' religious group, Cornerstone, only after the group explicitly informed the University that it sought access to the facilities for the purpose of offering prayer, singing hymns, reading scripture, and teaching biblical principles. Cornerstone described their meetings as follows: "Although these meetings would not appear to a casual observer to correspond precisely to a traditional worship service, there is no doubt that worship is an important part of the general atmosphere." *Chess* v. *Widmar*, 480 F. Supp. 907, 910 (1979).[1] The issue here is only whether the University

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[1] Cornerstone was denied access to University facilities because it intended to use those facilities for regular religious services in which "worship is an important part of the general atmosphere." There is no issue here as to the application of the regulation to "religious teaching." Reaching this issue is particularly inappropriate in this case because nothing in the record indicates how the University has interpreted the phrase "religious teaching" or even whether it has ever been applied to activity that was not clearly "religious worship." The District Court noted that plaintiffs did not contend that they were "limited, in any way, from holding on-campus meetings that do *not* include religious worship services." 480 F. Supp., at 913. At oral argument, counsel for the University indicated that the regulation would not bar discussion of biblical texts under circumstances that did not constitute "religious worship." Tr. of Oral Arg. 9. The sole question in this case involves application of the regulation to prohibit regular religious worship services in University buildings.

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regulation as applied and interpreted in this case is impermissible under the Federal Constitution. If it is impermissible, it is because it runs afoul of either the Free Speech or the Free Exercise Clause of the First Amendment.

A large part of respondents' argument, accepted by the court below and accepted by the majority, is founded on the proposition that because religious worship uses speech, it is protected by the Free Speech Clause of the First Amendment.[2] Not only is it protected, they argue, but religious worship *qua* speech is not different from any other variety of protected speech as a matter of constitutional principle. I believe that this proposition is plainly wrong. Were it right, the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech.

Although the majority describes this argument as "novel," *ante*, at 269, n. 6, I believe it to be clearly supported by our previous cases. Just last Term, the Court found it suffi-

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[2] Given that the majority's entire argument turns on this description of religious services as speech, it is surprising that the majority assumes this proposition to require no argument. The majority assumes the conclusion by describing the University's action as discriminating against "speakers based on their desire to . . . engage in religious worship and discussion." *Ante*, at 269. As noted above, it is not at all clear that the University has discriminated or intends to discriminate against "religious discussion"—as a preliminary matter, it is not even clear what the majority means by "religious discussion" or how it entered the case. That religious worship is a form of speech, the majority takes to have been established by three cases. *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Saia* v. *New York*, 334 U. S. 558 (1948). None of these cases stand for this proposition. *Heffron* and *Saia* involved the communication of religious views to a nonreligious, public audience. Talk about religion and about religious beliefs, however, is not the same as religious services of worship. *Niemotko* was an equal protection challenge to a discriminatory denial of one religious group's access to a public park. The Court specifically stated that it was not addressing the question of whether the State could uniformly deny all religious groups access to public parks. 340 U. S., at 272.

ciently obvious that the Establishment Clause prohibited a State from posting a copy of the Ten Commandments on the classroom wall that a statute requiring such a posting was summarily struck down. *Stone* v. *Graham*, 449 U. S. 39 (1980). That case necessarily presumed that the State could not ignore the religious content of the written message, nor was it permitted to treat that content as it would, or must, treat other—secular—messages under the First Amendment's protection of speech. Similarly, the Court's decisions prohibiting prayer in the public schools rest on a content-based distinction between varieties of speech: as a speech act, apart from its content, a prayer is indistinguishable from a biology lesson. See *Abington School District* v. *Schempp*, 374 U. S. 203 (1963); *Engel* v. *Vitale*, 370 U. S. 421 (1962). Operation of the Free Exercise Clause is equally dependent, in certain circumstances, on recognition of a content-based distinction between religious and secular speech. Thus, in *Torcaso* v. *Watkins*, 367 U. S. 488 (1961), the Court struck down, as violative of the Free Exercise Clause, a state requirement that made a declaration of belief in God a condition of state employment. A declaration is again a speech act, but it was the content of the speech that brought the case within the scope of the Free Exercise Clause.

If the majority were right that no distinction may be drawn between verbal acts of worship and other verbal acts, all of these cases would have to be reconsidered. Although I agree that the line may be difficult to draw in many cases, surely the majority cannot seriously suggest that no line may ever be drawn.[3] If that were the case, the majority would

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[3] Indeed, while footnote 6 of the majority opinion suggests that no intelligible distinction may be drawn between worship and other forms of speech, footnote 9 recognizes that the Establishment Clause "requires" that such a line be drawn. The majority does not adequately explain why the State is "required" to observe a line in one context, but prohibited from voluntarily recognizing it in another context.

have to uphold the University's right to offer a class entitled "Sunday Mass." Under the majority's view, such a class would be—as a matter of constitutional principle—indistinguishable from a class entitled "The History of the Catholic Church."[4]

There may be instances in which a State's attempt to disentangle itself from religious worship would intrude upon secular speech about religion. In such a case, the State's action would be subject to challenge under the Free Speech Clause of the First Amendment. This is not such a case. This case involves religious worship only; the fact that that worship is accomplished through speech does not add anything to respondents' argument. That argument must rely upon the claim that the State's action impermissibly interferes with the free exercise of respondents' religious practices. Although this is a close question, I conclude that it does not.

Plausible analogies on either side suggest themselves. Respondents argue, and the majority agrees, that by permitting any student group to use its facilities for communicative purposes other than religious worship, the University has created a "public forum." *Ante*, at 267–268. With ample

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[4] Counsel for respondents was somewhat more forthright in recognizing the extraordinary breadth of his argument, than is the majority. Counsel explicitly stated that once the distinction between speech and worship is collapsed a university that generally provides student groups access to its facilities would be constitutionally required to allow its facilities to be used as a church for the purpose of holding "regular church services." Tr. of Oral Arg. 26. Similarly, although the majority opinion limits its discussion to student groups, counsel for respondents recognized that the First Amendment argument relied upon would apply equally to nonstudent groups. He recognized that respondents' submission would require the University to make available its buildings to the Catholic Church and other denominations for the purpose of holding religious services, if University facilities were made available to nonstudent groups. *Id.*, at 39. In other words, the University could not avoid the conversion of one of its buildings into a church, as long as the religious group meets the same neutral requirements of entry—*e. g.*, rent—as are imposed on other groups.

support, they argue that the State may not make content-based distinctions as to what groups may use, or what messages may be conveyed in, such a forum. See *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972); *Cox* v. *Louisiana*, 379 U. S. 536 (1965). The right of the religious to nondiscriminatory access to the public forum is well established. See *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943). Moreover, it is clear that there are bounds beyond which the University could not go in enforcing its regulation: I do not suppose it could prevent students from saying grace before meals in the school cafeteria, or prevent distribution of religious literature on campus.[5]

Petitioners, on the other hand, argue that allowing use of their facilities for religious worship is constitutionally indistinguishable from directly subsidizing such religious services: It would "fun[d] a specifically religious activity in an otherwise substantially secular setting." *Hunt* v. *McNair*, 413 U. S. 734, 743 (1973). They argue that the fact that secular student groups are entitled to the in-kind subsidy at issue here does not establish that a religious group is entitled to the same subsidy. They could convincingly argue, for example, that a state university that pays for basketballs for the basketball team is not thereby required to pay for Bibles for a group like Cornerstone.[6]

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[5] There are obvious limits on the scope of this analogy. I know of no precedent holding that simply because a public forum is open to all kinds of speech—including speech about religion—it must be open to regular religious worship services as well. I doubt that the State need stand by and allow its public forum to become a church for any religious sect that chooses to stand on its right of access to that forum.

[6] There are, of course, limits to this subsidy argument. *Sherbert* v. *Verner*, 374 U. S. 398 (1963), and *Thomas* v. *Indiana Employment Security Division*, 450 U. S. 707 (1981), demonstrate that in certain circumstances the State may be required to "subsidize," at least indirectly, religious practices, under circumstances in which it does not and need not subsidize similar behavior founded on secular motives.

A third analogy suggests itself, one that falls between these two extremes. There are a variety of state policies which incidentally benefit religion that this Court has upheld without implying that they were constitutionally required of the State. See *Board of Education* v. *Allen*, 392 U. S. 236 (1968) (state loan of textbooks to parochial school students); *Zorach* v. *Clauson*, 343 U. S. 306 (1952) (release of students from public schools, during school hours, to perform religious activities away from the school grounds); *Everson* v. *Board of Education*, 330 U. S. 1 (1947) (state provision of transportation to parochial school students). Provision of university facilities on a uniform basis to all student groups is not very different from provision of textbooks or transportation. From this perspective the issue is not whether the State must, or must not, open its facilities to religious worship; rather, it is whether the State may choose not to do so.

Each of these analogies is persuasive. Because they lead to different results, however, they are of limited help in reaching a decision here. They also demonstrate the difficulty in reconciling the various interests expressed in the Religion Clauses. In my view, therefore, resolution of this case is best achieved by returning to first principles. This requires an assessment of the burden on respondents' ability freely to exercise their religious beliefs and practices and of the State's interest in enforcing its regulation.

Respondents complain that compliance with the regulation would require them to meet "about a block and a half" from campus under conditions less comfortable than those previously available on campus.[7] I view this burden on free exer-

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[7] Respondents also complain that the University action has made their religious message less attractive by suggesting that it is not appropriate fare for the college campus. I give no weight to this because it is indistinguishable from an argument that respondents are entitled to the appearance of an endorsement of their beliefs and practices from the University.

cise as minimal. Because the burden is minimal, the State need do no more than demonstrate that the regulation furthers some permissible state end. The State's interest in avoiding claims that it is financing or otherwise supporting religious worship—in maintaining a definitive separation between church and State—is such an end. That the State truly does mean to act toward this end is amply supported by the treatment of religion in the State Constitution.[8] Thus, I believe the interest of the State is sufficiently strong to justify the imposition of the minimal burden on respondents' ability freely to exercise their religious beliefs.

On these facts, therefore, I cannot find that the application of the regulation to prevent Cornerstone from holding religious worship services in University facilities violates the First and Fourteenth Amendments. I would not hold as the majority does that if a university permits students and others to use its property for secular purposes, it must also furnish facilities to religious groups for the purposes of worship and the practice of their religion. Accordingly, I would reverse the judgment of the Court of Appeals.

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[8] Since 1820, the Missouri Constitution has contained provisions requiring a separation of church and State. The Missouri Supreme Court has held that the state constitutional provisions are "not only more explicit but more restrictive than the Establishment Clause of the United States Constitution." *Paster* v. *Tussey*, 512 S. W. 2d 97, 102 (1974).

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING ET AL. *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 80–737. Argued October 14, 1981—Decided December 14, 1981

A Berkeley, Cal., ordinance places a limitation of $250 on contributions to committees formed to support or oppose ballot measures submitted to a popular vote. When appellant association, which was formed to oppose a ballot measure imposing rent control in the city, accepted some contributions exceeding the $250 limit, appellee Berkeley Fair Campaign Practices Commission ordered the association to pay the excess into the city treasury. The association then brought suit in California Superior Court seeking injunctive relief against enforcement of the ordinance, and that court subsequently granted summary judgment for the association, holding that the ordinance was invalid on its face as a violation of the First Amendment. The California Court of Appeal affirmed, but the California Supreme Court reversed, holding that the ordinance furthered compelling governmental interests in ensuring that special interest groups could not "corrupt" the initiative process by spending large amounts to support or oppose a ballot measure, which interests outweighed the First Amendment interests infringed upon.

Held: The restraint imposed by the ordinance on the right of association and in turn on individual and collective rights of expression plainly contravenes both the right of association and the speech guarantees of the First Amendment. Pp. 294–300.

(a) To place a limit on individuals wishing to band together to advance their views on a ballot measure, while placing no limit on individuals acting alone, is clearly a restraint on the right of association. *Buckley* v. *Valeo*, 424 U. S. 1, held that contributions to candidates or their committees could be restricted in order to prevent corruption or its appearance. Here, there is no risk of corruption because this case relates to contributions to committees favoring or opposing ballot measures. Also, there is no risk that the voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure, since the contributors must make their identities known under the disclosure provisions of the ordinance. Under the exacting judicial review appropriate for in-

fringements of First Amendment rights, the $250 limit is unconstitutional. Pp. 295–299.

(b) The contribution limit automatically affects expenditures, and limits on expenditures operate as a direct restraint on freedom of expression of groups and individuals wishing to express themselves through groups. There is no significant state or public interest in curtailing debate and discussion of a ballot measure, and the integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed. Pp. 299–300.

27 Cal. 3d 819, 614 P 2d 742, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, POWELL, REHNQUIST, and STEVENS, JJ., joined. REHNQUIST, J., filed a concurring opinion, *post*, p. 300. MARSHALL, J., filed an opinion concurring in the judgment, *post*, p. 301. BLACKMUN and O'CONNOR, JJ., filed an opinion concurring in the judgment, *post*, p. 302. WHITE, J., filed a dissenting opinion, *post*, p. 303.

James R. Parrinello argued the cause for appellants. With him on the briefs was *John E. Mueller*.

Natalie E. West argued the cause for appellees. With her on the brief were *Steven L. Mayer* and *Charles O. Triebel, Jr.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The issue on appeal is whether a limitation of $250 on contributions to committees formed to support or oppose ballot measures violates the First Amendment.

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*Briefs of *amici curiae* urging reversal were filed by *Malcolm H. Furbush, Joseph I. Kelly*, and *Robert L. Harris* for Pacific Gas and Electric Co.; and by *Ronald A. Zumbrun* and *Raymond M. Momboisse* for the Pacific Legal Foundation.

Robert M. Myers filed a brief for the City of Santa Monica, California, as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *George Agnost* and *Burk E. Delventhal* for the City and County of San Francisco; and by *William W. Becker* for the New England Legal Foundation.

I

The voters of Berkeley, Cal., adopted the Election Reform Act of 1974, Ord. No. 4700–N. S., by initiative. The campaign ordinance so enacted placed limits on expenditures and contributions in campaigns involving both candidates and ballot measures.[1] Section 602 of the ordinance provides:

> "No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250)."[2]

Appellant Citizens Against Rent Control is an unincorporated association formed to oppose a ballot measure at issue in the April 19, 1977, election. The ballot measure would have imposed rent control on many of Berkeley's rental units. To make its views on the ballot measure known, Citizens Against Rent Control raised more than $108,000 from ap-

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[1] Section 217 of the ordinance defines "measure" as "any City Charter amendment, ordinance or other propositions submitted to a popular vote at an election, whether by initiative, referendum or recall procedure or otherwise, or circulated for the purposes of submission to a popular vote at any election, whether or not the proposition qualifies for the ballot."

[2] It was not clear in 1977 whether § 602 would be enforced. The prohibition on contributions to ballot measure campaign committees by corporations and labor unions, § 605, was invalidated in *Pacific Gas & Electric Co.* v. *City of Berkeley*, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976). Following *Buckley* v. *Valeo*, 424 U. S. 1 (1976), the city repealed a number of sections of the ordinance, such as § 513, which limited expenditures in support of or in opposition to a ballot measure to the lesser of $7,500 or 10 cents times the number of registered voters. When revising the ordinance to comply with these changes, the city mistakenly labeled § 602, the section challenged in this case, with the notation "do not enforce," but it corrected this error approximately three months before the election involved in this case.

proximately 1,300 contributors. It accepted nine contributions over the $250 limit. Those nine contributions totaled $20,850, or $18,600 more than if none of the contributions exceeded $250. Pursuant to § 604 of the ordinance,[3] appellee Berkeley Fair Campaign Practices Commission, 20 days before the election, ordered appellant Citizens Against Rent Control to pay $18,600 into the city treasury.

Two weeks before the election, Citizens Against Rent Control sought and obtained a temporary restraining order prohibiting enforcement of §§ 602 and 604. The ballot measure relating to rent control was defeated. The Superior Court subsequently granted Citizens Against Rent Control's motion for summary judgment, declaring that § 602 was invalid on its face because it violated the First Amendment of the United States Constitution and Art. I, § 2, of the California Constitution. A panel of the California Court of Appeal unanimously affirmed that conclusion.

The California Supreme Court, dividing 4–3, reversed. 27 Cal. 3d 819, 614 P. 2d 742 (1980). Citing *Buckley* v. *Valeo*, 424 U. S. 1 (1976), the majority announced that it would strictly scrutinize § 602. It concluded that the section furthered compelling governmental interests because it ensured that special interest groups could not "corrupt" the initiative process by spending large amounts to support or oppose a ballot measure. Such corruption, the court found, could produce apathetic voters; these governmental interests were held to outweigh the First Amendment interests infringed upon. Finally, it concluded that § 602 accomplished its goal

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[3] Section 604 states: "If any person is found guilty of violating the terms of this chapter, each campaign treasurer who received part or all of the contribution or contributions which constitute the violation shall pay promptly, from available campaign funds, if any, the amount received from such persons in excess of the amount permitted by this chapter to the City Auditor for deposit in the General fund of the City."

by the least restrictive means available. The California Supreme Court did not consider the disclosure requirements of the ordinance a sufficient prophylaxis to dispel perceptions of corruption.[4]

We noted probable jurisdiction, 450 U. S. 908 (1981), and we reverse.

II

The appellees concede that the challenged ordinance has an impact on First Amendment rights; the parties disagree only as to the extent of the impact. Long ago this Court admonished that with respect to the First Amendment:

> "[T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v. *Connecticut*, 310 U. S. 296, 304 (1940).

This was but another way of saying that regulation of First Amendment rights is always subject to exacting judicial review.

We begin by recalling that the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence and the pamphleteers were early examples of this phenomena and the Federalist Papers were perhaps the most significant and lasting example. The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or on a ballot measure. Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.

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[4] To assure public awareness of the sources of support for committees, § 112 of the ordinance requires the publication of a list of all contributors of more than $50 in local newspapers twice during the last seven days of a campaign.

The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted. The voters of the city of Berkeley adopted the challenged ordinance which places restrictions on that marketplace. It is irrelevant that the voters rather than a legislative body enacted § 602, because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation.

III

A

The Court has acknowledged the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP* v. *Alabama*, 357 U. S. 449, 460 (1958).

More recently the Court stated: "The First Amendment protects political association as well as political expression." *Buckley* v. *Valeo*, *supra*, at 15.

Buckley also made clear that contributors cannot be protected from the possibility that others will make larger contributions:

> "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources,"' and '"to assure unfettered inter-

> change of ideas for the bringing about of political and social changes desired by the people."' *New York Times Co.* v. *Sullivan*, [376 U. S.], at 266, 269, quoting *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945), and *Roth* v. *United States*, 354 U. S., at 484. The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion. Cf. *Eastern R. Conf.* v. *Noerr Motors*, 365 U. S. 127, 139 (1961)." 424 U. S., at 48–49.

The Court went on to note that the freedom of association "is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Id.*, at 65–66.[5] Under the Berkeley ordinance an affluent person can, acting alone, spend without limit to advocate individual views on a ballot measure. It is only when contributions are made in concert with one or more others in the exercise of the right of association that they are restricted by § 602.

There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them. To place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association. Section 602 does not seek to mute the voice of one individual, and it cannot be allowed to hobble the collective expressions of a group.

Buckley identified a single narrow exception to the rule that limits on political activity were contrary to the First

[5] The value of the right to associate is illustrated by the cost of reaching the public. Appellants represent that the cost of a single mailing to each of the 71,088 persons registered to vote in Berkeley in 1977 was $12,800. App. 32. The cost of a full-page advertisement in a Berkeley area newspaper, the Independent Gazette, was $1,620. Note, 79 Mich. L. Rev. 1421, 1433, n. 54 (1981).

Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate:*

> "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . .
>
> ". . . Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disasterous extent.' [*CSC* v. *Letter Carriers,*] 413 U. S., at 565." 424 U. S., at 26–27.

Buckley thus sustained limits on contributions to candidates and their committees.

Federal Courts of Appeals have recognized that *Buckley* does not support limitations on contributions to committees formed to favor or oppose *ballot measures.* In *C & C Plywood Corp.* v. *Hanson,* 583 F. 2d 421 (1978), the Ninth Circuit struck down a Montana statute prohibiting corporate contributions supporting or opposing ballot measures. In so doing the court noted:

> "The state interest in preventing corruption of officials, which provided the basis for the Supreme Court's finding in *Buckley* that restrictions could permissibly be placed on contributions, is not at issue here." *Id.,* at 425.

Similarly, the Fifth Circuit interpreted *Buckley* to hold that

> "[t]he sole governmental interest that the Supreme Court recognized as a justification for restricting contributions was the prevention of quid pro quo corruption between a contributor and a candidate." *Let's Help Florida* v. *McCrary,* 621 F. 2d 195, 199 (1980).

In *First National Bank of Boston* v. *Bellotti,* 435 U. S. 765 (1978), we held that a state could not prohibit corporations any more than it could preclude individuals from making con-

tributions or expenditures advocating views on ballot measures. The *Bellotti* Court relied on *Buckley* to strike down state legislative limits on advocacy relating to ballot measures:

> "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections [citations omitted] simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U. S., at 689." 435 U. S., at 790 (footnote omitted).

Notwithstanding *Buckley* and *Bellotti*, the city of Berkeley argues that § 602 is necessary as a prophylactic measure to make known the identity of supporters and opponents of ballot measures. It is true that when individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source. Here, there is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under § 112 of the ordinance, which requires publication of lists of contributors in advance of the voting. See n. 4, *supra*.

Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression. As we have noted, regulation of First Amendment rights is always subject to exacting judicial scrutiny. *Supra*, at 294. The public interest allegedly advanced by § 602—identifying the sources of support for and opposition to ballot measures—is insubstantial because voters may identify those

sources under the provisions of § 112. In addition, the record in this case does not support the California Supreme Court's conclusion that § 602 is needed to preserve voters' confidence in the ballot measure process. Cf. *Bellotti*, *supra*, at 789–790. It is clear, therefore, that § 602 does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights.[6]

B

Apart from the impermissible restraint on freedom of association, but virtually inseparable from it in this context, § 602 imposes a significant restraint on the freedom of expression of groups and those individuals who wish to express their views through committees. As we have noted, an individual may make expenditures without limit under § 602 on a ballot measure but may not contribute beyond the $250 limit when joining with others to advocate common views. The contribution limit thus automatically affects expenditures, and limits on expenditures operate as a direct restraint on freedom of expression of a group or committee desiring to engage in political dialogue concerning a ballot measure.

Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees there is no significant state or public interest in curtailing debate and discussion of a ballot measure. Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression. The integrity of the political system will be adequately protected if contributors are identified in a

[6]The dissent argues a case not before the Court. Its references to *Bellotti* relate to *corporate* contributions; § 602 limits contributions by *"persons."* The dissent's references to *Buckley* relate to contributions to *candidates* and their committees; the case before us relates to contributions to committees favoring or opposing *ballot measures*.

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public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions.

IV

A limit on contributions in this setting need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression. The restraint imposed by the Berkeley ordinance on rights of association and in turn on individual and collective rights of expression plainly contravenes both the right of association and the speech guarantees of the First Amendment. Accordingly, the judgment of the California Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

JUSTICE REHNQUIST, concurring.

I agree that the judgment of the Supreme Court of California must be reversed in this case. Unlike the factual situation in *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), the Berkeley ordinance was not aimed only at corporations, but sought to impose an across-the-board limitation on the size of contributions to committees formed to support or oppose ballot measure referenda. While one of the appellants here, Mason-McDuffie, is a California corporation, there is no indication that the Berkeley ordinance was aimed at corporations as opposed to individuals. Therefore, my dissenting opinion in *First National Bank of Boston* v. *Bellotti*, *supra*, which relied on the corporate shield which the State had granted to corporations as a form of *quid pro quo* for the limitation does not come into play. *Buckley* v. *Valeo*, 424 U. S. 1 (1976), holds that in this situation there is no state interest which could justify a limitation on the exercise of rights guaranteed under the First and Fourteenth Amendments to the United States Constitution.

JUSTICE MARSHALL, concurring in the judgment.

The Court today holds that a local ordinance restricting the amount of money that an individual can contribute to a committee organized to support or oppose a ballot measure violates the right to freedom of speech and association guaranteed by the First Amendment. In reaching this conclusion, however, the Court fails to indicate whether or not it attaches any constitutional significance to the fact that the Berkeley ordinance seeks to limit *contributions* as opposed to direct *expenditures*. As JUSTICE WHITE correctly notes in dissent, beginning with our decision in *Buckley* v. *Valeo*, 424 U. S. 1 (1976), this Court has *always* drawn a distinction between restrictions on contributions, and direct limitations on the amount an individual can expend for his own speech. As we noted last term in *California Medical Assn.* v. *FEC*, 453 U. S. 182, 196 (1980) (MARSHALL, J., joined by BRENNAN, WHITE, and STEVENS, JJ.), the "'speech by proxy'" that is achieved through contributions to a political campaign committee "is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection."

Because the Court's opinion is silent on the standard of review it is applying to this contributions limitation, I must assume that the Court is following our consistent position that this type of governmental action is subjected to less rigorous scrutiny than a direct restriction on expenditures. The city of Berkeley seeks to justify its ordinance on the ground that it is necessary to maintain voter confidence in government. If I found that the record before the California Supreme Court disclosed sufficient evidence to justify the conclusion that large contributions to ballot measure committees undermined the "confidence of the citizenry in government," *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 790 (1978), I would join JUSTICE WHITE in dissent on the ground that the State had demonstrated a sufficient governmental interest to sustain the indirect infringement on First Amend-

ment interests resulting from the operation of the Berkeley ordinance. Like JUSTICES BLACKMUN and O'CONNOR, however, I find no such evidentiary support in this record. I therefore concur in the judgment.

JUSTICE BLACKMUN and JUSTICE O'CONNOR, concurring in the judgment.

The contribution limitations at issue here encroach directly on political expression and association. Thus, Berkeley's ordinance cannot survive constitutional challenge unless it withstands "exacting scrutiny." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786 (1978). To meet this rigorous standard of review, Berkeley must demonstrate that its ordinance advances a sufficiently important governmental interest and employs means "'closely drawn to avoid unnecessary abridgment'" of First Amendment freedoms. *Ibid.* (quoting *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976)).

We would hold that Berkeley has neither demonstrated a genuine threat to its important governmental interests nor employed means closely drawn to avoid unnecessary abridgment of protected activity. In *Buckley*, this Court upheld limitations on contributions to candidates as necessary to prevent contributors from corrupting the representatives to whom the people have delegated political decisions. But curtailment of speech and association in a ballot measure campaign, where the people themselves render the ultimate political decision, cannot be justified on this basis.

Nor has Berkeley proved a genuine threat to its interest in maintaining voter confidence in government. We would not deny the legitimacy of that interest. Indeed, in *Bellotti*, this Court explicitly recognized that "[p]reserving the integrity of the electoral process, preventing corruption, . . . 'sustain-[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government,'" and "[p]reservation of the individual citizen's confidence in government" are "interests of the highest importance" in ballot measure elections. 435 U. S., at 788–789, citing and quoting

United States v. *Automobile Workers*, 352 U. S. 567, 570, 575 (1957). We did not find those interests threatened in *Bellotti*, however, in part because the State failed to show "by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes" or "the confidence of the citizenry in government." 435 U. S., at 789–790. The city's evidentiary support in this case is equally sparse.

Finally, Berkeley does not justify its contribution limit as necessary to encourage disclosure. We cannot accept the Court's conclusion that that interest is "insubstantial," given the Court's concession that "when individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source." *Ante*, at 298. Yet Berkeley need not impose a $250 ceiling on contributions to encourage disclosure so long as it vigorously enforces its already stringent disclosure laws. *Ante*, at 294, n. 4.

We need say no more in order to reverse. Accordingly, we concur in the judgment.

JUSTICE WHITE, dissenting.

In *Buckley* v. *Valeo*, 424 U. S. 1 (1976), the Court upheld restrictions on contributions but struck down limits on expenditures in campaigns for federal office that Congress, the body most expert in the matter, thought equally essential to protect the integrity of the election process. Two years later, a bare majority of the Court, substituting its judgment for that of the Massachusetts Legislature, invalidated that State's prohibition on corporate spending in referendum elections. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978). Disagreeing with the Court's assumption that those regulations inhibited the free interplay of political advocacy, I would have upheld the expenditure limitations at issue in *Buckley* and the restrictions contested in *Bellotti*.

This case poses a less encompassing regulation on campaign activity, one tailored to the odd measurements of

Buckley and *Bellotti*. Precisely because it reflects these decisions, the ordinance regulates contributions but not expenditures and does not prohibit corporate spending.[1] It is for that very reason perhaps that the effectiveness of the ordinance in preserving the integrity of the referendum process is debatable. Even so, the result here illustrates that the *Buckley* framework is most problematical and strengthens my belief that there is a proper role for carefully drafted limitations on expenditures.

Even under *Buckley*, however, the Berkeley ordinance represents such a negligible intrusion on expression and association that the measure should be upheld. The ordinance certainly does not go beyond what I understand the First Amendment to permit. For both these reasons, I dissent.

I

The Berkeley ordinance does not control the quantity or content of speech. Unlike the statute in *Bellotti*, it does not completely prohibit contributions and expenditures. Any person or company may contribute up to $250. If greater spending is desired, it must be made as an expenditure, and expenditures are not limited or otherwise controlled. Individuals also remain completely unfettered in their ability to join interested groups or otherwise directly participate in the campaign.

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[1] As originally passed by the voters, the Berkeley ordinance restricted expenditures as well as contributions to ballot measure campaigns. Following *Buckley* v. *Valeo*, 424 U. S. 1 (1976), and the California Supreme Court's invalidation of statewide expenditure limitations in ballot measure campaigns, *Citizens for Jobs & Energy* v. *Fair Political Practices Comm'n*, 16 Cal. 3d 671, 547 P. 2d 1386 (1976), the city of Berkeley repealed the expenditure limitations. In addition, the measure's original prohibition on corporate and labor union contributions to ballot measure campaigns was invalidated. *Pacific Gas & Electric Co.* v. *City of Berkeley*, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976).

The Court reaches the conclusion that the ordinance is unconstitutional only by giving *Buckley* the most extreme reading and by essentially giving the Berkeley ordinance no reading at all. It holds that the contributions involved here are "beyond question a very significant form of political expression." *Ante*, at 298. Yet in *Buckley* the Court found that contribution limitations "entai[l] only a marginal restriction upon the contributor's ability to engage in free communication." 424 U. S., at 20–21. As with contributions to candidates, ballot measure contributions "involv[e] speech by someone other than the contributor" and a limitation on such donations "does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.*, at 21. Indeed what today has become "a very significant form of political expression" was held just last Term to involve only "some limited element of protected speech." *California Medical Assn.* v. *FEC*, 453 U. S. 182, 196, n. 16 (1981) (MARSHALL, J., joined by BRENNAN, WHITE, and STEVENS, JJ.). "'Speech by proxy,'" we said, "is not the sort of advocacy that this Court in *Buckley* found entitled to full First Amendment protection." *Id.*, at 196.

The Court also finds that the freedom of association is impermissibly compromised by not allowing persons to contribute unlimited funds to committees organized to support or oppose a ballot measure. However, in *Buckley*, the Court observed that contribution ceilings "leav[e] persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." 424 U. S., at 28. Associational rights, it was thought, were seriously impinged only by expenditure ceilings—there by virtue of precluding associations from effectively amplifying the voice of their adherents, "the original basis for the recognition of First Amendment protection of the freedom of association." *Id.*, at 22. See *NAACP* v. *Alabama*, 357 U. S. 449,

460 (1958). The Court's concern that this ordinance will "hobble the collective expressions of a group" *ante*, at 296, is belied by the fact that appellants, having already met their campaign budget, ended all fundraising almost a month before the election.

It is bad enough that the Court overstates the extent to which First Amendment interests are implicated. But the Court goes on to assert that the ordinance furthers no legitimate public interest and cannot survive "any degree of scrutiny." Apparently the Court assumes this to be so because the ordinance is not directed at *quid pro quos* between large contributors and candidates for office, "the single narrow exception" for regulation that it viewed *Buckley* as endorsing. The *Buckley* Court, however, found it "unnecessary to look beyond the Act's primary purpose," the prevention of corruption, to uphold the contribution limits, and thus did not consider other possible interests for upholding the restriction. Indeed, at least since *United States* v. *Automobile Workers*, 352 U. S. 567, 575 (1957), the Court has recognized that "sustaining the active alert responsibility of the individual citizen in a democracy for the wise conduct of government" is a valid state interest. The *Bellotti* Court took care to note that this objective, along with "[p]reserving the integrity of the electoral process [and] the individual citizen's confidence in government" "are interests of the highest importance." 435 U. S., at 788–789.

In *Bellotti*, the Court found inadequate evidence in the record to support these interests, but it suggested that some regulation of corporate spending might be justified if "corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests." *Id.*, at 789. The Court suggested that such a situation would arise if it could be shown that "the relative voice of corporations ha[d] been overwhelming [and] . . . significant in influencing referenda."

Id., at 789–790. It is quite possible that such a test is fairly met in this case. Large contributions, mainly from corporate sources, have skyrocketed as the role of individuals has declined.[2] Staggering disparities have developed between spending for and against various ballot measures.[3] While it

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[2] The California Fair Political Practices Commission has reported that campaign contributions from private individuals in the November 1980 general election totaled only one-half of the individual contributions given during the 1978 general election and represented only 5% of all the contributions made. California Fair Political Practices Commission, Campaign Contribution and Spending Report (1981). The chairman of the Commission concluded that the figures demonstrate an "'alarming yet steady erosion of the private individual as a force in the political process.'" California Fair Political Practices Commission's Press Release 81–14, May 28, 1981. See also n. 3, *infra*.

[3] In a 1978 initiative over the construction of an oil storage terminal in Long Beach, Cal., Standard Oil of Ohio "contributed" all $864,568 spent by the Long Beach Civil Action Committee in support of the measure; opponents spent $17,721. S. Lydenberg, Bankrolling Ballots: The Role of Business in Financing State Ballot Question Campaigns 37 (1979).

In 1980, three ballot measures were rejected by California voters statewide. One was an initative which sought to circumscribe smoking in public places. The committee supporting the measure collected $676,216; $518,337 in contributions under $1,000. *Id.*, at 33. An opposing group, Californians Against Regulatory Excess, collected over $2,750,987. Of this amount, over $2.5 million was contributed in amounts of over $10,000, and four tobacco companies contributed between $300,000 and $1 million each. S. Lydenberg, Bankrolling Ballots: Update 1980, pp. 44–45 (1981).

A second example is an initiative which would have taxed large energy companies to provide revenue to finance public transportation and to develop alternative energy sources. Californians for Fair Taxation, an association opposed to the measure, received nearly $6 million in contributions, of which approximately $5 million was given by large corporations. Proponents mustered but $464,000. *Id.*, at 50–51.

The third measure, like the initiative in this litigation, concerned rent control. Proponents, who sought to repeal existing rent control ordinances, gathered $6,867,108, mostly in contributions over $1,000; opponents collected $195,496, mostly in contributions under $1,000. *Id.*, at 91–101.

is not possible to prove that heavy spending "bought" a victory on any particular ballot proposition, there is increasing evidence that large contributors are at least able to block the adoption of measures through the initiative process.[4] Recognition that enormous contributions from a few institutional sources can overshadow the efforts of individuals may have discouraged participation in ballot measure campaigns[5] and undermined public confidence in the referendum process.

By restricting the size of contributions, the Berkeley ordinance requires major contributors to communicate directly with the voters. If the ordinance has an ultimate impact on speech, it will be to assure that a diversity of views will be presented to the voters. As such, it will "facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley*, 424 U. S., at 92–93. Of course, entities remain free to make major direct expenditures. But because political communica-

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[4] Several studies have shown that large amounts of money skew the outcome of local ballot measure campaigns. Professor Lowenstein's investigation found that of 15 propositions supported by significant one-sided spending, defined as spending of at least $250,000 and twice as much as the opposite side, 7 were successful and 8 were defeated. On the other hand, of 10 propositions opposed by significant one-sided spending, 9 were defeated and only 1 was successful. D. Lowenstein, Campaign Spending and Ballot Propositions (delivered at annual meeting of American Political Science Association, New York City, Sept. 5, 1981). A study of three Colorado initiatives found that in each of the races the pro-initiative side held a commanding lead which it lost as the campaign progressed. Corporate-backed opposition forces heavily outspent their counterparts. On election day, each initiative was defeated. Mastro, Costlow, & Sanchez, Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It, 32 Fed. Comm. L. J. 315 (1980). See also J. Shockley, The Initiative Process in Colorado Politics: An Assessment (1980). Nationwide, a study of 19 recent campaigns found that the side with corporate backing outspent opponents by better than 2 to 1 in 15 campaigns and won in 12 of them. S. Lydenberg, Bankrolling Ballots: Update 1980 (1981).

[5] Voter turnout in Berkeley municipal elections has decreased from 65.9% in April 1973 to 45.6% in April 1981. Brief for Appellees 7.

tions must state the source of funds, voters will be able to identify the source of such messages and recognize that the communication reflects, for example, the opinion of a single powerful corporate interest rather than the views of a large number of individuals. As the existence of disclosure laws in many States suggests,[6] information concerning who supports or opposes a ballot measure significantly affects voter evaluation of the proposal.[7] The Court asserts, without elaboration, that existing disclosure requirements suffice to inform voters of the identity of contributors. Yet, the inadequacy of disclosure laws was a major reason for the adoption of the Berkeley ordinance. Section 101(d) of the ordinance constitutes a finding by the people of Berkeley that "the influence of large campaign contributors is increased because existing laws for disclosure of campaign receipts and expenditures have proved to be inadequate."

Admittedly, Berkeley cannot present conclusive evidence of a causal relationship between major undisclosed expenditures and the demise of the referendum as a tool of direct democracy. But the information available suffices to demonstrate that the voters had valid reasons for adopting contribution ceilings. It was on a similar foundation that the Court upheld contribution limits in *Buckley* and *California Medical Assn.* v. *FEC*, 453 U. S. 182 (1981). In my view, the ordinance survives scrutiny under the *Buckley* and *Bellotti* cases.

II

There are other grounds for sustaining the ordinance. I continue to believe that because the limitations are content-

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[6] See Public Communications Office, Federal Election Commission, Campaign Finance Law 81 (1981). See also Mastro, Costlow, & Sanchez, *supra*, at 353–354.

[7] See *Brown* v. *Superior Court*, 5 Cal. 3d 509, 522, 487 P. 2d 1224, 1232 (1971) ("A ballot measure is devoid of personality and voters who seek to judge the merits of issues by reliance on the personality of those supporting different points of view can do so only if they are made aware, prior to election, of those who are the real advocates for or against the measure").

neutral, and because many regulatory actions will indirectly affect speech in the same manner as regulations in the sphere of campaign finance, "the argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much." *Buckley*, *supra*, at 262 (WHITE, J., concurring in part and dissenting in part). Every form of regulation—from taxes to compulsory bargaining—has some effect on the ability of individuals and corporations to engage in expressive activity. We must therefore focus on the extent to which expressive and associational activity is restricted by the Berkeley ordinance. That First Amendment interests are implicated should begin, not end, our inquiry. When the infringement is as slight and ephemeral as it is here, the requisite state interest to justify the regulation need not be so high.

The interests which justify the Berkeley ordinance can properly be understood only in the context of the historic role of the initiative in California. "California's entire history demonstrates the repeated use of referendums to give citizens a voice on questions of public policy." *James* v. *Valtierra*, 402 U. S. 137, 141 (1971). From its earliest days, it was designed to circumvent the undue influence of large corporate interests on government decisionmaking.[8] It served, as President Wilson put it, as a "gun behind the door" to keep political bosses and legislators honest. In more recent years, concerned that the heavy financial participation by corporations in referendum contests has undermined this tool of direct democracy, the voters of California enacted by

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[8] See V. Key & W. Crouch, The Initiative and Referendum in California 425–432 (1939); Lee, California, in Referendums: A Comparative Study of Practice and Theory 87–88 (D. Butler & A. Ranney eds. 1978); Note, The California Initiative Process: A Suggestion for Reform, 48 S. Cal. L. Rev. 922, 923 (1975) ("The primary motivation for the initiative process in California was the public's desire to counter the lobbyist, the conduit of legislative influence exercised by and for economic and other special interests").

initiative in 1974 the Political Reform Act, which limited expenditures in statewide ballot measure campaigns,[9] and Berkeley voters adopted the ordinance at issue in this case. The role of the initiative in California cannot be separated from its purpose of preventing the dominance of special interests. That is the very history and purpose of the initiative in California, and similarly it is the purpose of ancillary regulations designed to protect it. Both serve to maximize the exchange of political discourse. As in *Bellotti*, "[t]he Court's fundamental error is its failure to realize that the state regulatory interests . . . are themselves derived from the First Amendment." 435 U. S., at 803–804 (WHITE, J., dissenting).

Perhaps, as I have said, neither the city of Berkeley nor the State of California can "prove" that elections have been or can be unfairly won by special interest groups spending large sums of money, but there is a widespread conviction in legislative halls, as well as among citizens, that the danger is real. I regret that the Court continues to disregard that hazard.

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[9] Political Reform Act of 1974, Cal. Gov't Code Ann. § 81000 *et seq.* (West 1976). See n. 1, *supra*.

POLK COUNTY ET AL. *v.* DODSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80–824. Argued October 13, 1981—Decided December 14, 1981

Respondent brought suit in Federal District Court under 42 U. S. C. § 1983 against petitioners Polk County, its Offender Advocate, its Board of Supervisors, and Martha Shepard, an attorney in the Offender Advocate's Office. As the factual basis for his lawsuit, respondent alleged that Shepard, who had been assigned to represent him in an appeal of a criminal conviction to the Iowa Supreme Court, failed to represent him adequately since she had moved for permission to withdraw as counsel on the ground that respondent's claims were legally frivolous. The Iowa Supreme Court granted Shepard's motion and dismissed respondent's appeal. In the District Court, respondent alleged that Shepard's actions violated certain of his constitutional rights. To establish that Shepard acted "under color of state law," a jurisdictional requisite for a § 1983 action, respondent relied on her employment by the county. The District Court dismissed the claims against all of the petitioners, but the Court of Appeals reversed.

Held:

1. A public defender does not act "under color of state law" when performing a lawyer's traditional functions as counsel to an indigent defendant in a state criminal proceeding. Because it was based on such activities, the complaint against Shepard must be dismissed. Pp. 317–325.

(a) From the moment of Shepard's assignment to represent respondent, their relationship became identical to that existing between any other lawyer and client, except for the source of Shepard's payment. The legal system posits that a defense lawyer best serves the public, not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client. This is essentially a private function for which state office and authority are not needed. Pp. 317–319.

(b) Cases in which this Court assumed that state-employed doctors serving in supervisory capacities at state institutions could be held liable under § 1983 are not controlling. *O'Connor* v. *Donaldson*, 422 U. S. 563, and *Estelle* v. *Gamble*, 429 U. S. 97, distinguished. Pp. 319–320.

(c) Although the employment relationship between the State and a public defender is a relevant factor, it is insufficient to establish that a

public defender acts under color of state law within the meaning of § 1983. A public defender is not amenable to administrative direction in the same sense as other state employees. And equally important, it is the State's constitutional obligation to respect the professional independence of the public defenders whom it engages. Pp. 320–322.

(d) It is the ethical obligation of any lawyer—whether privately retained or publicly appointed—not to clog the courts with frivolous motions or appeals. Respondent has no legitimate complaint that Shepard failed to prosecute a frivolous appeal on his behalf. Pp. 322–324.

2. Respondent has not alleged unconstitutional action by Polk County, its Offender Advocate, or its Board of Supervisors. To the extent that his claims rest on a *respondeat superior* theory of liability, they fail to present a claim under § 1983. And a constitutional tort actionable under § 1983 is not described by the bald allegations that Shepard had injured respondent while acting pursuant to administrative rules and procedures and that the county "retains and maintains, advocates out of law school" who have on numerous occasions moved to withdraw from appeals of convictions. Respondent failed to allege any administrative policy that arguably caused a violation of his rights under the Sixth, Eighth, or Fourteenth Amendments. An official policy of withdrawal from frivolous cases would not violate the Constitution. Pp. 325–327.

628 F. 2d 1104, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 327. BLACKMUN, J., filed a dissenting opinion, *post*, p. 328.

Norman G. Jesse argued the cause for petitioners. With him on the briefs was *Dan L. Johnston*.

John D. Hudson, by appointment of the Court, 450 U. S. 992, argued the cause and filed a brief for respondent.

Edwin S. Kneedler argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Acting Solicitor General Wallace*, *Acting Assistant Attorney General Turner*, *Elinor Hadley Stillman*, *Walter W. Barnett*, and *Louise A. Lerner*.*

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*Briefs of *amici curiae* were filed by *C. Paul Jones* and *Mollie G. Raskind* for the Minnesota State Public Defender; and by *Richard J. Wilson* and *Howard B. Eisenberg* for the National Legal Aid and Defender Association et al.

JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether a public defender acts "under color of state law" when representing an indigent defendant in a state criminal proceeding.

I

This case arose when the respondent Russell Richard Dodson filed a *pro se* complaint in the United States District Court for the Southern District of Iowa. Dodson brought the action in federal court under 42 U. S. C. § 1983. As the factual basis for his lawsuit Dodson alleged that Martha Shepard, an attorney in the Polk County Offender Advocate's Office, had failed to represent him adequately in an appeal to the Iowa Supreme Court.[1]

A full-time employee of the county, Shepard had been assigned to represent Dodson in the appeal of a conviction for robbery. After inquiring into the case, however, she moved for permission to withdraw as counsel on the ground that Dodson's claims were wholly frivolous.[2] Shepard accompanied her motion with an affidavit explaining this conclusion.

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[1] According to findings made in the District Court: "[T]he Offender Advocate is the independent creation of the Polk County Board of Supervisors. It or one of its lawyers is appointed by the court to represent indigent defendants. It has a salaried lawyer director and several full time salaried lawyers. It is fully funded by Polk County." 483 F. Supp. 347, 349, n. 2 (1979). The office handles about 2,500 cases per year.

[2] She did so pursuant to Rule 104 of the Iowa Rules of Appellate Procedure, which provides in pertinent part:

"(a) If counsel appointed to represent a convicted indigent defendant in an appeal to the supreme court is convinced after conscientious investigation of the trial transcript that the appeal is frivolous and that he cannot, in good conscience, proceed with the appeal, he may move the supreme court in writing to withdraw. The motion must be accompanied by a brief referring to anything in the record that might arguably support the appeal."

Rule 104 also provides that prior to filing any motion to withdraw, the lawyer must advise his client in writing of his intention to do so. The cli-

She also filed a memorandum summarizing Dodson's claims and the supporting legal arguments. On November 9, 1979, the Iowa Supreme Court granted the motion to withdraw and dismissed Dodson's appeal.

In his complaint in the District Court the respondent alleged that Shepard's actions, especially her motion to withdraw, had deprived him of his right to counsel, subjected him to cruel and unusual punishment, and denied him due process of law.[3] He sought injunctive relief as well as damages in the amount of $175,000. To establish that Shepard acted "under color of state law," a jurisdictional requisite for a § 1983 action, Dodson relied on her employment by the county. Dodson also sued Polk County, the Polk County Offender Advocate, and the Polk County Board of Supervisors. He alleged that the Offender Advocate and the Board of Supervisors had established the rules and procedures that Shepard was bound to follow in handling criminal appeals.

The District Court dismissed Dodson's claims against all defendants. 483 F. Supp. 347 (1979). It held that the relevant actions by Shepard had not occurred under color of state law. Canvassing the leading authorities, it reasoned that a public defender owes a duty of undivided loyalty to his client. A public defender therefore could not be sued as an agent of the State. The District Court dismissed the Offender Advocate from the suit on the same theory. It also held

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ent then has 30 days in which to notify the Supreme Court if he still wishes to proceed with the appeal. If the client does not communicate with the Supreme Court, the motion will be granted and the appeal dismissed. If the client does express a desire to proceed, the Supreme Court will review the legal points raised. If the court finds them not to be frivolous, "it may grant counsel's motion to withdraw but will prior to submission of the appeal afford the indigent the assistance of new counsel, to be appointed by the trial court." Iowa Rule App. Proc. 104(*f*).

The Iowa procedure is very similar to that prescribed by this Court in *Anders* v. *California*, 386 U. S. 738 (1967).

[3] Dodson also asserted pendent claims for malpractice and breach of an oral promise to prosecute the appeal.

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that Dodson's complaint failed to allege the requisite personal involvement to state a § 1983 claim against Polk County and the Board of Supervisors.

The Court of Appeals for the Eighth Circuit reversed. 628 F. 2d 1104 (1980). Like the District Court, it assumed that a public defender owed his client the same responsibility as any other attorney. In its view, however, the "dispositive point" was that Iowa Offender Advocates were "employees of the County," which was "merely a creature of the State." Whether public defenders received instructions from county officials was "beside the point." "Public defenders receive their power not because they are selected by their clients, but because they are employed by the County to represent a certain class of clients, who likely have little or no choice in selecting the lawyer who will defend them." *Id.*, at 1106. In holding as it did on this issue, the court recognized that its decision conflicted with the holdings of a number of other Courts of Appeals. Reasoning that Dodson's *pro se* complaint should be liberally construed, the court also ordered reinstatement of the § 1983 claims against the Offender Advocate and the Board of Supervisors. The question of their involvement was left for factual development in the District Court. In addition, the court ordered that Dodson be given an opportunity on remand to state his claim against the county with greater specificity. Finally, the court rejected the argument that a public defender should enjoy the same immunity provided to judges and prosecutors. It held that the defendants were entitled to a defense of "good faith," but not of "absolute," immunity.

One member of the panel filed a dissent. The dissent argued that a person acts under color of state law only when exercising powers created by the authority of the State. In this case, it reasoned, the alleged wrongs were not made possible only because the defendant was a public defender. In

essence the complaint asserted an ordinary malpractice claim, which would be equally maintainable against a retained attorney or appointed counsel. The dissent also argued that public defenders should be entitled to absolute immunity from suit.

We granted certiorari to resolve the division among the Courts of Appeals over whether a public defender acts under color of state law when providing representation to an indigent client.[4] 450 U. S. 963 (1981). We now reverse.

II

In *United States* v. *Classic*, 313 U. S. 299, 326 (1941), this Court held that a person acts under color of state law only when exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the

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[4] The Courts of Appeals for the Seventh and Eighth Circuits have held that public defenders do act under color of state law in their representation of indigent defendants. See *Robinson* v. *Bergstrom*, 579 F. 2d 401, 405–408 (CA7 1978) (public defender acts under color of state law but is absolutely immune from suit under § 1983); 628 F. 2d 1104 (1980) (case below). The Fifth and the Tenth Circuits have held that they do not. See *Slavin* v. *Curry*, 574 F. 2d 1256, 1265 (CA5), modified on other grounds, 583 F. 2d 779 (1978); *Espinoza* v. *Rogers*, 470 F. 2d 1174, 1175 (CA10 1972). The Third and Ninth Circuits have supported the latter position in dicta, in cases in which they have held that public defenders are entitled to absolute immunity from suit under § 1983. See *Brown* v. *Joseph*, 463 F. 2d 1046, 1048 (CA3 1972), cert. denied, 412 U. S. 950 (1973); *Miller* v. *Barilla*, 549 F. 2d 648, 650 (CA9 1977).

The petition for certiorari in this case also presented an immunity question. The petitioners asked us to decide whether public defenders are entitled to the same absolute immunity as judges, see *Bradley* v. *Fisher*, 13 Wall. 335 (1872), and prosecutors, see *Imbler* v. *Pachtman*, 424 U. S. 409 (1976). As we hold that a public defender does not act under color of state law when performing the traditional functions of counsel to a criminal defendant, we need not reach the immunity issue.

authority of state law."[5] In this case the Offender Advocate for Polk County assigned Martha Shepard to represent Russell Dodson in the appeal of his criminal conviction. This assignment entailed functions and obligations in no way dependent on state authority. From the moment of her appointment, Shepard became Dodson's lawyer, and Dodson became Shepard's client. Except for the source of payment, their relationship became identical to that existing between any other lawyer and client. "Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program." ABA Standards for Criminal Justice 4–3.9 (2d ed. 1980).[6]

Within the context of our legal system, the duties of a defense lawyer are those of a personal counselor and advocate. It is often said that lawyers are "officers of the court." But the Courts of Appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor "under color of state law" within the meaning of § 1983.[7] In our system a defense lawyer characteristically opposes the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advanc-

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[5] The Court has reiterated this definition in subsequent cases. See, *e. g.*, *Screws* v. *United States*, 325 U. S. 91 (1945); *Monroe* v. *Pape*, 365 U. S. 167 (1961).

[6] See Burger, Counsel for the Prosecution and Defense—Their Roles Under the Minimum Standards, 8 Am. Crim. L. Q. 2, 6 (1969). This view of the public defender's obligations to his client has been accepted by virtually every court that has considered the issue. See, *e. g.*, *Espinoza* v. *Rogers*, *supra*, at 1175; *Brown* v. *Joseph*, *supra*, at 1048.

[7] See, *e. g.*, *Skolnick* v. *Martin*, 317 F. 2d 855 (CA7 1963); *Dotlich* v. *Kane*, 497 F. 2d 390 (CA8 1974). This is true even of cases in which a private attorney has been assigned to represent an indigent defendant. See, *e. g.*, *Page* v. *Sharpe*, 487 F. 2d 567, 570 (CA1 1973); *Hall* v. *Quillen*, 631 F. 2d 1154, 1156 (CA4 1980); *Mulligan* v. *Schlachter*, 389 F. 2d 231,

ing "the undivided interests of his client."[8] This is essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed.[9]

III

The respondent argues that a public defender's employment relationship with the State, rather than his function, should determine whether he acts under color of state law. We take a different view.

A

In arguing that the employment relationship establishes that the public defender acts under color of state law, Dodson relies heavily on two cases in which this Court assumed that physicians, whose relationships with their patients have not traditionally depended on state authority, could be held liable under § 1983. See *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975); *Estelle* v. *Gamble*, 429 U. S. 97 (1976). These cases, he argues, are analytically identical to this one. Like the physicians in *O'Connor* and *Estelle*, a public defender is paid by the State. Further, like the institutionalized patients in

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233 (CA6 1968); *French* v. *Corrigan*, 432 F. 2d 1211, 1214 (CA7 1970), cert. denied, 401 U. S. 915 (1971); *Barnes* v. *Dorsey*, 480 F. 2d 1057, 1061 (CA8 1973).

[8] *Ferri* v. *Ackerman*, 444 U. S. 193, 204 (1979):

"[T]he primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation."

[9] Although lawyers are generally licensed by the States, "they are not officials of government by virtue of being lawyers." *In re Griffiths*, 413 U. S. 717, 729 (1973).

those cases, an indigent convict is unable to choose the professional who will render him traditionally private services. These factors, it is argued, establish that public defenders—like physicians in state hospitals—act under color of state law and are amenable to suit under § 1983.

In our view *O'Connor* and *Estelle* are distinguishable from this case. *O'Connor* involved claims against a psychiatrist who served as the superintendent at a state mental hospital. Although a physician with traditionally private obligations to his patients, he was sued in his capacity as a state custodian and administrator. Unlike a lawyer, the administrator of a state hospital owes no duty of "undivided loyalty" to his patients. On the contrary, it is his function to protect the interest of the public as well as that of his wards. Similarly, *Estelle* involved a physician who was the medical director of the Texas Department of Corrections and also the chief medical officer of a prison hospital. He saw his patients in a custodial as well as a medical capacity.

Because of their custodial and supervisory functions, the state-employed doctors in *O'Connor* and *Estelle* faced their employer in a very different posture than does a public defender. Institutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve. With the public defender it is different. As argued in the dissenting opinion in the Court of Appeals, it is the function of the public defender to enter "not guilty" pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses, and make closing arguments in behalf of defendants.[10] All of these are adversarial functions. We find it peculiarly difficult to detect any color of state law in such activities.

B

Despite the public defender's obligation to represent his clients against the State, Dodson argues—and the Court of Appeals concluded—that the status of the public defender

[10] See 628 F. 2d, at 1110.

differs materially from that of other defense lawyers. Because public defenders are paid by the State, it is argued that they are subject to supervision by persons with interests unrelated to those of indigent clients. Although the employment relationship is certainly a relevant factor, we find it insufficient to establish that a public defender acts under color of state law within the meaning of § 1983.

First, a public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, see *Moore* v. *United States*, 432 F. 2d 730 (CA3 1970), a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." DR 5–107(B), ABA Code of Professional Responsibility (1976).[11]

Second, and equally important, it is the constitutional obligation of the State to respect the professional independence

[11] This rule has been adopted verbatim as DR 5–107(B), Iowa Code of Professional Responsibility for Lawyers, printed in Iowa Rules of Court 526 (1981). The rule is "mandatory in character," and a lawyer who violated it would be "subject to disciplinary action" by the Iowa courts. *Id.*, at 477. See *Sanchez* v. *Murphy*, 385 F. Supp. 1362, 1365 (Nev. 1974) ("The personal attorney-client relationship established between a deputy [public defender] and a defendant is not one that the public defender can control. The canons of professional ethics require that the deputy be 'his own man' irrespective of advice or pressures from others. A deputy public defender cannot in any realistic sense, in fulfillment of his professional responsibilities, be a servant of the public defender. He is, himself an independent officer").

of the public defenders whom it engages.[12] This Court's decision in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), established the right of state criminal defendants to the "'guiding hand of counsel at every step in the proceedings against [them].'" *Id.*, at 345, quoting *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932). Implicit in the concept of a "guiding hand" is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate. See, *e. g.*, *Gideon* v. *Wainwright*, *supra*; *Holloway* v. *Arkansas*, 435 U. S. 475 (1978). At least in the absence of pleading and proof to the contrary, we therefore cannot assume that Polk County, having employed public defenders to satisfy the State's obligations under *Gideon* v. *Wainwright*, has attempted to control their action in a manner inconsistent with the principles on which *Gideon* rests.[13]

C

The respondent urges a different view of the public defender's relationships to his clients and to the State. Whatever

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[12] Relying on such cases as *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961), and *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163 (1972), the respondent claims that the State's funding of criminal defenses makes it a "joint participant" in that enterprise, locked in a "symbiotic relationship" with individual public defenders. He urges us to hold on this theory that public defenders act under color of state law within the meaning of § 1983. We cannot do so. In both *Burton* and *Moose Lodge* the question was whether "state action" was present. In this case the question is whether a public defender—who is concededly an employee of the county—acted "under color of state law" in her representation of Russell Dodson. Although this Court has sometimes treated the questions as if they were identical, see *United States* v. *Price*, 383 U. S. 787, 794, and n. 7 (1966), we need not consider their relationship in order to decide this case. Our factual inquiry into the professional obligations and functions of a public defender persuades us that Shepard was not a "joint participant" with the State and that, when representing respondent, she was not acting under color of state law.

[13] The dissenting opinion, *post*, at 328, describes the public defender as "a full-time state employee, working in an office fully funded and extensively

their ethical obligations, public defenders do not, he argues, characteristically extend their clients the same undivided loyalty tendered by privately retained attorneys. In support of this argument Dodson notes that the public defender moved to be dismissed from his case against the client's wishes. Dodson claims to have suffered prejudice from this act. He insists that such action would not have been taken by a privately retained attorney.

Dodson's argument assumes that a private lawyer would have borne no professional obligation to refuse to prosecute a frivolous appeal. This is error. In claiming that a public defender is peculiarly subject to divided loyalties, Dodson confuses a lawyer's ethical obligations to the judicial system with an allegiance to the adversary interests of the State in a criminal prosecution. Although a defense attorney has a duty to advance all colorable claims and defenses, the canons of professional ethics impose limits on permissible advocacy. It is the obligation of any lawyer—whether privately retained or publicly appointed—not to clog the courts with frivolous motions or appeals.[14] Dodson has no legitimate complaint that his lawyer refused to do so.

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regulated by the State and acting to fulfill a state obligation." The dissent reasons from this description that, for purposes of determining the "under color of state law" question, the function performed by the public defender is immaterial. There is no difference in this respect, the dissent contends, between administrative functions, see *Branti* v. *Finkel*, 445 U. S. 507 (1980), and a lawyer's traditional functions as counsel to a defendant in a criminal proceeding. This view ignores the basic distinction that in the latter capacity a public defender is not acting on behalf of the State; he is the State's adversary.

[14] See ABA Standards for Criminal Justice, Commentary to 4–3.9 (2d ed. 1980) ("No lawyer, whether assigned by the court, part of a legal aid or defender staff, or privately retained or paid, has any duty to take any steps or present dilatory or frivolous motions or any actions that are unfounded according to the lawyer's informed professional judgment. On the contrary, to do so is unprofessional conduct"); ABA Standing Committee on Ethics and Professional Responsibility, Informal Opinion 955, Obligation to Take Criminal Appeal, reprinted in 2 Informal Ethics Opinions 955–956

As a matter of empirical fact, it may or may not be true that the professional obligation to withdraw from frivolous appeals will be invoked with disproportionate frequency in cases involving indigent prisoners. The recent burgeoning of postconviction remedies has undoubtedly subjected the legal system to unprecedented strains, including increased demands for legal assistance.[15] The State of Iowa has responded by authorizing the provision of greater representation than the Constitution requires. Its system of public defenders contemplates the extension of legal assistance through the various tiers of postconviction review, incorporating only the general ethical limitation that counsel should withdraw from frivolous cases.[16]

In this context Dodson argues that public defenders making withdrawal decisions are viewed by indigent prisoners as hostile state actors. We think there is little justification for this view, if indeed it is widely held.[17]

IV

In concluding that Shepard did not act under color of state law in exercising her independent professional judgment in a criminal proceeding, we do not suggest that a public defender

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(1975) (like court-appointed lawyer, private counsel "ethically, should not clog the courts with frivolous motions or appeals"). See also *Nickols* v. *Gagnon*, 454 F. 2d 467, 472 (CA7 1971).

[15] See ABA Standards for Criminal Justice, Commentary to 4–3.9 (2d ed. 1980) (noting that lawyers assigned to indigent prisoners are often put under pressure to "engage in dilatory or frivolous tactics").

[16] See Iowa Code, Ch. 336A (1981). A public defender appointed pursuant to the state statute is directed to "prosecute any appeals or other remedies before or after conviction that he considers to be in the interest of justice." § 336A.6.

[17] The view is unfortunate. Our adversary system functions best when a lawyer enjoys the wholehearted confidence of his client. But confidence will not be improved by creating a disincentive for the States to provide postconviction assistance to indigent prisoners. To impose § 1983 liability for a lawyer's performance of traditional functions as counsel to a criminal defendant would have precisely that effect.

never acts in that role. In *Branti* v. *Finkel*, 445 U. S. 507 (1980), for example, we found that a public defender so acted when making hiring and firing decisions on behalf of the State. It may be—although the question is not present in this case—that a public defender also would act under color of state law while performing certain administrative and possibly investigative functions. Cf. *Imbler* v. *Pachtman*, 424 U. S. 409, 430–431, and n. 33 (1976). And of course we intimate no views as to a public defender's liability for malpractice in an appropriate case under state tort law. See *Ferri* v. *Ackerman*, 444 U. S. 193, 198 (1979).[18] With respect to Dodson's § 1983 claims against Shepard, we decide only that a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding.[19] Because it was based on such activities, the complaint against Shepard must be dismissed.

V

In his complaint in the District Court, Dodson also asserted § 1983 claims against the Offender Advocate, Polk County, and the Polk County Board of Supervisors. Section 1983 will not support a claim based on a *respondeat superior* theory of liability. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 694 (1978). To the extent that Dodson's claims rest on this basis, they fail to present a federal claim.

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[18] In addition to possible relief under state tort law, an indigent prisoner retains the right to initiate state and federal habeas corpus proceedings. For an innocent prisoner wrongly incarcerated as the result of ineffective or malicious counsel, this normally is the most important form of judicial relief.

[19] We do not disturb the theory of cases, brought under 18 U. S. C. § 242, in which public defenders have been prosecuted for extorting payment from clients' friends or relatives "under color of . . . law . . . ." See, *e. g.*, *United States* v. *Senak*, 477 F. 2d 304 (CA7), cert. denied, 414 U. S. 856 (1973).

The Court of Appeals apparently read Dodson's *pro se* complaint as susceptible of another construction. It found an actionable claim in the bald allegation that Shepard had injured him while acting pursuant to administrative "rules and procedures for . . . handling criminal appeals" and that her employers were therefore responsible for her actions. 628 F. 2d, at 1108. We also have noted an allegation in respondent's complaint that the county "retains and maintains, advocates out of law school" who have on numerous occasions moved to withdraw from appeals of criminal convictions.

The question is whether either allegation describes a constitutional tort actionable under § 1983. We conclude not. In *Monell* v. *New York City Dept. of Social Services*, *supra*, we held that official policy must be "the moving force of the constitutional violation" in order to establish the liability of a government body under § 1983. *Id.*, at 694. See *Rizzo* v. *Goode*, 423 U. S. 362, 370–377 (1976) (general allegation of administrative negligence fails to state a constitutional claim cognizable under § 1983). In this case the respondent failed to allege any policy that arguably violated his rights under the Sixth, Eighth, or Fourteenth Amendments. He did assert that assistant public defenders refused to prosecute certain appeals on grounds of their frivolity. But a policy of withdrawal from frivolous cases would not violate the Constitution. *Anders* v. *California*, 386 U. S. 738 (1967). And respondent argued the existence of no impermissible policy pursuant to which the withdrawals might have occurred. Respondent further asserted that he personally was deprived of a Sixth Amendment right to effective counsel. Again, however, he failed to allege that this deprivation was caused by any constitutionally forbidden rule or procedure.

When Dodson's complaint is viewed against the standards of our cases, even in light of the sympathetic pleading requirements applicable to *pro se* petitioners, see *Haines* v. *Kerner*, 404 U. S. 519 (1972) *(per curiam)*, we do not believe

he has alleged unconstitutional action by the Offender Advocate, Polk County, or the Polk County Board of Supervisors. Accordingly, his claims against them must be dismissed.

VI

For the reasons stated in this opinion, the decision of the Court of Appeals is

Reversed.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but it is important to emphasize that in providing counsel for an accused the governmental participation is very limited. Under *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), the government undertakes only to provide a professionally qualified advocate wholly independent of the government. It is the independence from governmental control as to how the assigned task is to be performed that is crucial. The advocate, as an officer of the court which issued the commission to practice, owes an obligation to the court to repudiate any external effort to direct how the obligations to the client are to be carried out. The obligations owed by the attorney to the client are defined by the professional codes, not by the governmental entity from which the defense advocate's compensation is derived. Disciplinary Rule 5–107 (B) of the ABA Code of Professional Responsibility* succinctly states the rule:

*See, *e. g.*, ABA Code Of Professional Responsibility, Canon 5 (1976): "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Ethical Consideration 5–1 explains this Canon:

"The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

See also ABA Standards for Criminal Justice, The Prosecution Function, Ch. 3, The Defense Function, Ch. 4 (2d ed. 1980).

"(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

Moreover, it is elementary that every advocate has an obligation to eschew proceedings considered to be professionally improper or irresponsible. Once counsel in this case reached a considered judgment on the merits of the claim sought to be put forward, her actions were consistent with the highest traditions of the Bar.

JUSTICE BLACKMUN, dissenting.

One perhaps should be particularly circumspect when he finds himself in solitary dissent. See *Commissioner* v. *"Americans United" Inc.*, 416 U. S. 752, 763 (1974) (dissenting opinion). On careful reflection, however, I am convinced that my position is a valid one, and I therefore set forth my views in opposition to those of the Court.

When a full-time state employee, working in an office fully funded and extensively regulated by the State and acting to fulfill a state obligation, violates a person's constitutional rights, the Court consistently has held that the employee acts "under color of" state law, within the meaning and reach of 42 U. S. C. § 1983. Because I conclude that the Court's decision in this case is contrary to its prior rulings on the meaning of "under color of" state law, and because the Court charts new territory by adopting a functional test in determining liability under the statute, I respectfully dissent.

I

The Court holds for the first time today that a government official's "employment relationship" is no more than a "relevant factor" in determining whether he acts under color of state law within the meaning of § 1983. *Ante*, at 321. Only

last Term, in *Parratt* v. *Taylor*, 451 U. S. 527 (1981), the Court noted that defendant-prison officials unquestionably satisfied the under-color-of-state-law requirement because they "were, after all, state employees in positions of considerable authority." *Id.*, at 535–536. Thus began, and ended, the Court's discussion of the color-of-law question in that case. As in *Taylor*, the county employee sued in this action presumptively acts under color of state law. See also *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 157, n. 5 (1978).

The definition of "under color of" state law relied upon by the Court here and articulated in *United States* v. *Classic*, 313 U. S. 299 (1941), requires that the defendants in a § 1983 action have committed the challenged acts "in the course of their performance of duties" and have misused power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ." *Id.*, at 325–326. See also *Screws* v. *United States*, 325 U. S. 91, 110 (1945) (plurality opinion).

Respondent's allegations place this case squarely within both components of that definition. Respondent challenges action taken by petitioner Shepard, a full-time county employee, while acting in her official capacity and while exercising her responsibilities pursuant to Iowa law. See generally Iowa Code §§ 336A.3.2, 336A.6 (1981). The Court implicitly concedes that the Offender Advocate's assignment of Shepard to handle respondent's appeal was action under color of law. But the Court then fails to recognize that it was by virtue of that assignment that Shepard had the authority to represent respondent and to seek permission to withdraw as his counsel, thereby allegedly violating his constitutional rights. The authority of a privately retained attorney to represent his clients is derived from the client's selection of the lawyer. A public defender's power, however, is possessed by virtue of the State's selection of the attorney and his official employment.

The Court insists that public defenders, unlike other state employees, are free from state control because they are not subject to administrative direction—both because ethical standards require that their professional judgment not be sacrificed to the interests of their employers and because the State is obligated to provide indigent defendants with independent advocates.[1] This distinction ignores both precedent and reality. The Court long has held that a state official acts under color of law when the State does not authorize, or even know of, his conduct. See, *e. g.*, *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 152 (1970); *Monroe* v. *Pape*, 365 U. S. 167 (1961). That the State did not instruct Shepard to withdraw from respondent's case is therefore irrelevant to the question whether she acted under color of state law in so doing.

Moreover, the present case is indistinguishable from *Estelle* v. *Gamble*, 429 U. S. 97 (1976). There the Court held that a prison doctor's deliberate indifference to a prisoner's medical needs is prohibited by the Eighth Amendment and may be the subject of a § 1983 claim. The prisoner's § 1983

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[1] The Court also says that a public defender's ethical duties and obligations are the same as those of a privately retained lawyer and concludes that the public defender serves "essentially a private function . . . for which state office and authority are not needed." *Ante*, at 319. The fact that a state official's role is parallel to one in the private sector, however, has never before deterred the Court from holding that the former is action under color of state law. Section 1983 is meant to proscribe certain actions by state officials even though identical conduct by private persons is not included within the statute's scope. Cf. *Estelle* v. *Gamble*, 429 U. S. 97 (1976); see also *Griffin* v. *Maryland*, 378 U. S. 130, 135 (1964) ("If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity . . ."). Although *Griffin* involved "state action" under the Fourteenth Amendment, "state action" and "under color of state law" have consistently been treated as incorporating identical requirements. See n. 5, *infra*.

complaint in *Gamble* stated claims against Dr. Gray in his capacity both as medical director for the Texas Department of Corrections *and* as treating physician. Gray was sued because he allegedly had given the plaintiff substandard medical care—the doctor's duty to the public and his custodial and supervisory functions were not at issue.[2] If the Court had determined that Gray acted under color of state law only in his capacity as a custodian and administrator, it would have dismissed the claims against him for want of subject-matter jurisdiction, rather than on the merits.

The Court today holds that a public defender cannot act under color of state law because of his independent ethical obligations to his client. Yet *Gamble* cannot be distinguished on this ground. An individual physician has a professional and ethical obligation to his patient just as an attorney has to his client. Like a public defender, an institutional doctor's responsibilities to a patient may conflict with institutional policies and practices. Moreover, Dr. Gray was fulfilling the State's duty to supply medical care to prison inmates; similarly, the public defender is dedicated to satisfying the State's obligation to provide representation to indigent defendants. Finally, like respondent, who had no say in the selection of Shepard as his attorney, inmate Gamble had no role in the choice of Gray as his doctor. The *Gamble* Court did not find that color of state law evaporated in the face of a professional's independent ethical obligations. I cannot see why this case is different.

As is demonstrated by the pervasive involvement of the county in the operations of the Offender Advocate's Office,

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[2] Similarly, in *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975), the defendant, a psychiatrist and superintendent of a state mental hospital, was not sued for actions taken pursuant to his responsibilities to protect the public; the evidence clearly showed that the plaintiff was hospitalized for reasons other than dangerousness to himself and others. See *id.*, at 567–568, 574, n. 9.

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the Court, in my view, unduly minimizes the influence that the government actually has over the public defender. The public defender is not merely paid by the county; he is totally dependent financially on the County Board of Supervisors, which fixes the compensation for the public defender and his staff and provides the office with equipment and supplies. See Iowa Code §§ 336A.5, 336A.9 (1981).

The Board likewise is statutorily empowered to determine "indigency" and to prescribe the number of assistant attorneys and other staff members considered necessary for the public defender. See §§ 336A.4, 336A.5. The county's control over the size of and funding for the public defender's office, as well as over the number of potential clients, effectively dictates the size of an individual attorney's caseload and influences substantially the amount of time the attorney is able to devote to each case. The public defender's discretion in handling individual cases—and therefore his ability to provide effective assistance to his clients—is circumscribed to an extent not experienced by privately retained attorneys. See, *e. g.*, *Robinson* v. *Bergstrom*, 579 F. 2d 401, 402–403 (CA7 1978) (public defender delayed five and one-half years in filing appellate brief because of "an error in his judgment regarding his caseload," which was 600 to 900 cases per year). Similarly, authority over the appointment of the public defender and his staff, see Iowa Code §§ 336A.3, 336A.5 (1981), gives the State substantial influence over the quality of the representation indigents receive.

In addition, the public defender is directed to file an annual report with the judges of the district court of any county he serves, the State's Attorney General, and each county's Board of Supervisors, setting forth in detail all cases handled by the defender's office during the preceding year. § 336A.8. This requirement suggests that the government has some supervisory control over the public defender's office, or at least that the public defender will be wary of antagonizing the officials to whom he must report, and to

whom he owes his appointment and the very existence of the office. See §§ 336A.3, 336A.1. And surely the public defender's staff must conform to whatever policies and regulations the office or the State imposes, including those aimed at ensuring the effectiveness of representation. In this case, for example, while the county may not have directed petitioner Shepard to withdraw from respondent's case,[3] it certainly could have established general guidelines describing the factors a public defender should consider in determining which appeals are frivolous and the proper treatment of such appeals.[4]

On the basis of the Court's opinion in *Estelle* v. *Gamble*, 429 U. S. 97 (1976), and the county's pervasive involvement with the Offender Advocate's Office in this case, I necessarily conclude that the presumption that a state employee acts

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[3] Reasoning that § 1983 claims may not be based on the doctrine of *respondeat superior*, the Court concludes that respondent has not stated a claim against the Offender Advocate, Polk County, or the County Board of Supervisors. See *ante*, at 325–327. I agree with the Court of Appeals, however, that respondent did allege that these defendants had "established and layed *[sic]* out the ground rules" for the public defender's office and had "authorize[d] [petitioner Shepard] to act in the manner prescribed in [the] complaint. . . ." App. 5. Respondent also alleged that other public defenders in the Offender Advocate's Office had acted in the same manner as had Shepard, and he challenged the "process" by which the office represented indigents. *Id.*, at 13. Although respondent did not point to any particular official policy pursuant to which Shepard had acted in withdrawing from his case, his general allegations of the existence of such a policy, "however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence." *Haines* v. *Kerner*, 404 U. S. 519, 520 (1972). If respondent is unable to substantiate his claims, the complaint, of course, may be dismissed on a motion for summary judgment.

[4] This pervasive state control over public defenders distinguishes them from court-appointed attorneys, who are not state officials, who have control over their own caseloads and representations, who depend on the State only for a fee, and with whom the State has no real day-to-day involvement.

under color of state law when exercising his official duties is not overridden by the public defender's ethical obligations to his client.[5]

II

Although holding that petitioner Shepard may not be held liable under § 1983 for withdrawing from respondent's appeal, the Court limits its ruling to cases where the public defender performs "a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Ante*, at 325. The Court appears to concede that a public defender may act under color of state law when performing unspecified administrative and investigative functions, or even when acting as an advocate—if his conduct is "nontraditional," or if the plaintiff pleads and proves that the State influenced the attorney's representation. See *ante*, at 325, and n. 19, and 322. These attempts to draw distinctions based on function are unconvincing.

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[5] Although I find the Court's precedents on the definition of "under color of" state law persuasive here, I also draw support from the Court's discussions of state action under the Fourteenth Amendment. I find no basis for the Court's intimation, *ante*, at 322, n. 12, that the two doctrines incorporate different requirements. See *United States* v. *Price*, 383 U. S. 787, 794, n. 7 (1966). To the extent that the Court has analyzed the two concepts separately, it has done so in § 1983 suits against private actors. In *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 157, n. 5 (1978), the Court observed: "Of course, where the defendant is a public official, the two elements of a § 1983 action merge. 'The involvement of a state official . . . plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment . . . rights, whether or not the actions of the [officer] were officially authorized, or lawful.' *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 152 (1970) (citations omitted)." (Ellipses in original.)

The principles articulated in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961), for discerning state action in the conduct of a private party are therefore helpful by way of analogy. First, the public defender's office "constitute[s] a physically and financially integral and, indeed, indispensable part of the State's plan," *id.*, at 723–724, to fulfill its constitutional obligation to provide representation to indigents. Second, the relation-

The Court never before has held that a government employee acts under color of state law while performing some of his official duties but not while performing others. The Court drew no such distinctions in *Estelle* v. *Gamble*, *supra*, although it could have adopted the Court's approach today and held that an institutional physician acts under color of state law when acting in his custodial and administrative roles, but not when treating a patient. I can only conclude that the Court creates this artificial distinction in order to avoid a conflict with *Branti* v. *Finkel*, 445 U. S. 507 (1980), where the Court did not pause to question whether the defendant-public defender acted under color of state law.

Imbler v. *Pachtman*, 424 U. S. 409 (1976), cited by the Court, *ante*, at 325, does not support such line-drawing. Based on policy considerations that are inapplicable here, see n. 8, *infra*, the Court held in *Imbler* that the prosecutor enjoys absolute immunity for actions taken in his role as an advocate. The Court refused to decide, however, whether the same policies require immunity for prosecutors acting in their administrative or investigative roles. Not only did the *Imbler* Court therefore fail to endorse the functional test adopted here, but it pointed to the difficulties it foresaw in implementing such a test. See 424 U. S., at 431, n. 33.

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ship between the State and the public defender is a symbiotic one: the State is able to satisfy its responsibility to supply counsel to defendants, and the public defender is gainfully employed. Finally, the State is responsible for the public defender's office and can attempt to ensure that clients receive effective assistance of counsel, for example, by hiring qualified personnel, providing sufficient funding, and enforcing strict standards of competence. In cases of ineffective assistance by public defenders, then, it may be said that the State "has not only made itself a party to the [representation], but has elected to place its power, property and prestige behind [the public defender's action]. The State has so far insinuated itself into a position of interdependence with [the attorney] that it must be recognized as a joint participant in the challenged activity . . . ." *Id.*, at 725.

Moreover, the question of immunity—what type of affirmative defense is to be afforded a state official sued under § 1983—is completely different from the issue whether an employee acts under color of state law—a determination that goes to a federal court's subject-matter jurisdiction over a complaint. If a defendant does not act under color of state law, a federal court has no power to entertain a § 1983 complaint against him. The immunity doctrine, which is based on common-law traditions and policy considerations, is a defense that must be pleaded and is not relevant to a court's power to consider the case. Even officials protected by absolute immunity act under color of state law, and *Imbler* did not indicate to the contrary; in fact, absolute immunity protects a prosecutor from § 1983 liability only as long as his actions are within the scope of the immunity. See *Imbler*, 424 U. S., at 419, n. 13. The Court nowhere suggested in *Imbler* that the functional test could properly be used in any other context.

The Court also disclaims any intent to disturb cases in which public defenders have been prosecuted under the criminal counterpart of § 1983, 18 U. S. C. § 242, for extorting payment from clients' friends or relatives, *ante*, at 325, n. 19, citing *United States* v. *Senak*, 477 F. 2d 304 (CA7), cert. denied, 414 U. S. 856 (1973), apparently because the Court does not consider such conduct a "traditional" function of an attorney.[6] Yet the Court of Appeals' holding in *Senak* that the attorney acted under color of law is inconsistent with the

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[6] Again, the Court's hand is forced somewhat by precedent—even those officials afforded absolute immunity from civil damages under § 1983 are susceptible to prosecution under § 242 for the willful violation of civil rights. See *Imbler* v. *Pachtman*, 424 U. S. 409, 429 (1976). The Court has consistently held that the two provisions incorporate the same under-color-of-state-law requirement. See, *e. g.*, *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 152, n. 7 (1970); *United States* v. *Price*, 383 U. S., at 794, n. 7.

Court's line-drawing here.[7] As the final loophole, the Court apparently leaves open the possibility that an indigent defendant could plead and prove that the State so influenced the public defender assigned to his case as to make the public defender liable under § 1983. See *ante*, at 322. What type of state intervention is sufficient, and how a plaintiff is supposed to allege such facts before discovery, are not specified.

In essence, the Court appears to be holding a public defender exempt from § 1983 liability only when the alleged injury is ineffective assistance of counsel. Not only is it disturbing to see the Court adopt a hierarchy of constitutional rights for purposes of § 1983 actions, but such an approach will be extremely difficult to implement. I envision the Court's functional analysis as having one of two results—both, in my view, unfortunate. If the federal courts in effect adopt a *per se* rule and dismiss all § 1983 complaints against public defenders, the most egregious behavior by a public defender, even if unquestionably the result of pressures by the State, will not be cognizable under § 1983. Alternatively, the courts may attempt diligently to implement the Court's ruling and dismiss only those § 1983 claims based on the public defender's "traditional" functions as an advocate. The outcome then, I fear, will be lengthy and involved hearings on the merits to determine whether the court has subject-matter jurisdiction—the very result the Court wishes to avoid.

III

I am sympathetic with the Court's desire to protect public defenders, who represent indigent defendants in good faith, from a § 1983 suit by every dissatisfied client. But the Court's concern for public defender programs—and its seeming hostility to the merits of respondent's claims, see *ante*, at 323–324, and n. 17—do not justify the approach taken by the

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[7] In *Senak* the Court of Appeals held that a public defender's demand for compensation from a client was made "ostensibly by virtue of [the attor-

Court today. To recognize that public defenders act under color of state law would not transform every legal malpractice into a constitutional violation. Cf. *Estelle* v. *Gamble*, 429 U. S., at 105–106. Presumably, some immunity would be provided public defenders sued under § 1983.[8] The Court always has seen fit before to rely on immunity and the procedures available for dismissing meritless complaints in order to protect state officials. See, *e. g.*, *Butz* v. *Economou*, 438 U. S. 478, 507–508 (1978); cf. *Ferri* v. *Ackerman*, 444 U. S. 193, 200, n. 17 (1979). I would do the same here.

I would affirm the judgment of the Court of Appeals.

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ney's] appointment 'backed by the power of the state,'" and that his official position "gave him the opportunity to make the demands and clothed him with the authority of the state in so doing." 477 F. 2d, at 308. Similarly, in this case, petitioner Shepard's authority to withdraw from respondent's case was derived from her "appointment 'backed by the power of the state'"; her official position "gave her the opportunity" to act so as allegedly to violate respondent's constitutional rights.

[8] I do not discuss this issue in detail because the Court does not reach it, but I assume that public defenders should be afforded qualified immunity. Absolute immunity has been extended only to those in positions that have a common-law history of immunity. See, *e. g.*, *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967). Moreover, public defenders' jobs do not subject them to conflicting responsibilities to a number of constituencies so that absolute immunity is necessary to ensure principled decisionmaking; in fact, the threat of § 1983 claims by dissatisfied clients may provide additional incentive for competent performance of a public defender's duties. See *Ferri* v. *Ackerman*, 444 U. S. 193, 203–204 (1979).

HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY *v.* RIVERA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 81–17. Decided December 14, 1981

A New York trial judge, sitting without a jury, convicted respondent and his wife but acquitted their codefendant on charges arising out of a robbery, notwithstanding if the judge had credited the testimony of the prosecution's main witness (the victim), he presumably would have convicted all three defendants or, conversely, if he had credited the testimony of the only defense witness (the codefendant), he presumably would have acquitted all three. Respondent's conviction was affirmed on appeal. His subsequent application in Federal District Court for a writ of habeas corpus was denied. On appeal, the Court of Appeals held that the New York trial judge had committed constitutional error because he had not explained the apparent inconsistency in his verdicts acquitting the codefendant and convicting respondent. Accordingly, the court ordered the state trial judge either to grant respondent a new trial or to make findings demonstrating a rational basis for the facially inconsistent verdicts.

Held:

1. The Court of Appeals erred when, without first determining whether an inconsistent verdict would be unconstitutional, it directed the state trial judge to provide an explanation of the apparent inconsistency in his verdicts. Federal judges have no general supervisory power over state trial judges and may not require the observance of any special procedures except when necessary to assure compliance with the dictates of the Federal Constitution.

2. An apparent inconsistency in a trial judge's verdict does not give rise to an inference of irregularity in his finding of guilt that is sufficiently strong to overcome the well-established presumption that the judge adhered to basic rules of procedure. Here, even assuming that the codefendant's acquittal was logically inconsistent with respondent's conviction, respondent, who was found guilty beyond a reasonable doubt after a fair trial, has no constitutional ground to complain that his codefendant was acquitted.

Certiorari granted; 643 F. 2d 86, reversed.

PER CURIAM.

The questions presented by the certiorari petition concern the constitutionality of inconsistent verdicts in a nonjury criminal trial. Certiorari is granted and the judgment of the United States Court of Appeals for the Second Circuit is reversed.

During the morning of March 26, 1973, respondent, Jose Rivera, his wife Cynthia Humdy, and their friend, Earl Robinson, entered the apartment of Milagros Torres. After a neighbor heard a woman scream, he called the police. The police arrested Humdy on the fire escape with $540 in cash in her coat pocket, and when the apartment door was opened, they found the place in shambles and arrested respondent and Robinson.

Each of the three intruders was indicted on five separate charges arising out of this one episode.[1] They were tried jointly by a justice of the Supreme Court of New York sitting without a jury. The principal government witness was the victim Torres; Robinson was the only defense witness. If the judge had credited all of the testimony of Torres, presumably he would have found all three defendants guilty on all counts; acquittals presumably would have been rendered if the judge had credited all of Robinson's testimony. However, he found all defendants not guilty on three counts, acquitted Robinson on all counts, and convicted respondent and his wife of robbery in the second degree, grand larceny in the third degree, and burglary in the third degree.[2] Respondent's convictions were affirmed on appeal. *People* v. *Rivera*, 57 App. Div. 2d 738, 393 N. Y. S. 2d 630, leave to appeal denied, 42 N. Y. 2d 894, 366 N. E. 2d 887 (1977).

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[1] They were indicted for robbery in the first degree, robbery in the second degree, possession of a dangerous weapon, grand larceny in the third degree, and burglary in the second degree.

[2] The grand larceny count was dismissed at the sentencing stage as a lesser included count within robbery in the second degree.

In 1978, the United States District Court for the Southern District of New York denied respondent's application for a federal writ of habeas corpus. After reviewing the trial record, the District Court rejected several challenges to the conviction which he described as "variations on the claim of insufficiency of the evidence."[3]

On appeal from that judgment, the United States Court of Appeals for the Second Circuit concluded that there was an apparent inconsistency in the state trial judge's general verdicts acquitting Robinson and convicting respondent. 643 F. 2d 86. The Court of Appeals held that the New York trial judge had committed constitutional error because he had not explained that apparent inconsistency on the record.[4] The court therefore entered an order requiring the state trial court either to grant respondent a new trial or to demonstrate by appropriate findings that there is a rational basis

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[3] "The next argument set forth is directed at the sufficiency of the evidence presented in petitioner's state court criminal trial. Such an allegation is beyond the scope of federal habeas corpus review and does not rise to the level of a constitutional infringement, *United States ex rel. Nersesian* v. *Smith*, 418 F. Supp. 26, 27 (SDNY 1976) unless 'there was no proof whatever of the crime charged.' *United States ex rel. Terry* v. *Henderson*, 426 F. 2d 1125, 1131 (2d Cir. 1972). I have reviewed the trial transcript. Any allegation that the trial record is devoid of evidence must be rejected as are Petitioner's Points IV, VI, VII, and VIII which, when liberally read, are variations on the claim of insufficiency of the evidence." App. to Pet. for Cert. A–12.

The District Court's ruling predated this Court's decision in *Jackson* v. *Virginia*, 443 U. S. 307 (1979). The Court of Appeals held, however, that the insufficiency of the evidence claim is without merit even under the test of *Jackson*. 643 F. 2d 86, 90, n. 2 (CA2 1981).

[4] The Court of Appeals concluded that "when verdicts in a non-jury trial are facially inconsistent, the Due Process Clause of the Fourteenth Amendment does not permit a conviction to stand unless the trial court demonstrates by appropriate findings that the conviction validly rests on a rational basis." *Id.*, at 87.

for the facially inconsistent verdicts.[5] Under the Court of Appeals' holding, the adequacy of that explanation would thereafter be subject to review by the federal courts, which, if they were persuaded that the verdicts were irrationally inconsistent, would then decide whether respondent's conviction is constitutionally permissible.[6] The Court of Appeals recognized that its constitutional holding was unprecedented.[7]

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[5] "For the foregoing reasons we reverse the District Court's judgment and remand with directions to enter an order conditionally vacating petitioner's conviction and awarding him a new trial unless the state trial court demonstrates by appropriate findings rendered within ninety days that petitioner's conviction is valid." *Id.*, at 97.

[6] "If the state trial court makes findings purporting to demonstrate the validity of the conviction, petitioner may return to the District Court and renew his habeas corpus challenge to his conviction. At that point, the issue will be whether the state court conviction, considered in light of the acquittal of petitioner's co-defendant and in light of the state trial court's findings, denies petitioner his liberty without due process of law." *Id.*, at 97–98 (footnote omitted).

[7] See *id.*, at 94. The Court of Appeals relied on *United States* v. *Maybury*, 274 F. 2d 899 (1960), in which a divided panel of the Second Circuit reversed a conviction on one count of a two-count indictment because the majority found the acquittal on the second count to be inconsistent with the conviction on the first. Judge Friendly expressed the view that the defendant could be retried on both counts, *id.*, at 904–906; Judge Lumbard expressed the view that the defendant could be retried on neither count and that the indictment must be dismissed, *id.*, at 906–907 (dissenting in part). Judge Learned Hand concluded that the verdicts were not logically inconsistent and would not have reversed the conviction "[r]egardless of whether the doctrine of [*Dunn* v. *United States*, 284 U. S. 390 (1932)] applies to cases tried to a judge." *Id.*, at 908 (dissenting in part and concurring in part). As the Court of Appeals in this case recognized, "in prohibiting inconsistent bench trial verdicts, *Maybury* does not purport to rest on any provision of the Constitution and may well have been decided solely in the exercise of the Court's supervisory power over the administration of criminal justice within this Circuit." 643 F. 2d, at 94.

In this case the Court of Appeals described the "*Maybury* rule barring inconsistent verdicts in federal criminal bench trials" as "well established

This case does not raise any question concerning the significance that an appellate court may attach to an apparent inconsistency in a verdict that is subject to review on direct appeal. This federal proceeding constituted a collateral attack on the final judgment of a state court that already had been affirmed on direct appeal. In such a proceeding a federal court is authorized to issue "a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254(a).[8]

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in this Circuit." *Id.*, at 91. We note, however, that in none of the three cases cited for that proposition was a verdict actually overturned on the ground of inconsistency. Indeed, in one of those cases the court expressly noted that an inconsistency resulting from an acquittal that may have rested on the trial judge's erroneous view of the law could not justify reversal of the conviction. See *United States* v. *Wilson*, 342 F. 2d 43, 45 (CA2 1965). In all events, the Court of Appeals noted: "To our knowledge, however, this is the first time that a habeas applicant has asked us to overturn a state conviction on the basis of the *Maybury* rule." 643 F. 2d, at 91.

In *United States* v. *Duz-Mor Diagnostic Laboratory, Inc.*, 650 F. 2d 223 (1981), a panel of the United States Court of Appeals for the Ninth Circuit followed the Second Circuit's reasoning in this case.

[8] In *Cupp* v. *Naughten*, 414 U. S. 141, 146 (1973), with particular reference to a challenged jury instruction, the Court articulated the difference between a federal court of appeals' supervisory power over the district courts within its jurisdiction and the court of appeals' authority to grant relief under 28 U. S. C. § 2254:

"Within such a unitary jurisdictional framework the appellate court will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution. Thus even substantial unanimity among federal courts of appeals that the instruction in question ought not to be given in United States district courts within their respective jurisdictions is not, without more, authority for declaring that the giving of the instruction makes a resulting conviction invalid under the Fourteenth Amend-

In view of the limited scope of review of a state judgment authorized in a federal habeas corpus proceeding, it is plain that the Court of Appeals erred in this case. On the assumption that the Court of Appeals correctly determined that the verdicts are facially inconsistent, we hold that there is no federal requirement that a state trial judge explain his reasons for acquitting a defendant in a state criminal trial; even if the acquittal rests on an improper ground, that error would not create a constitutional defect in a guilty verdict that is supported by sufficient evidence and is the product of a fair trial.

I

The work of appellate judges is facilitated when trial judges make findings of fact that explain the basis for controversial rulings.[9] Although there are occasions when an explanation of the reasons for a decision may be required by the demands of due process,[10] such occasions are the exception rather than the rule.[11] Federal judges have no general supervisory power over state trial judges; they may not require the observance of any special procedures except when neces-

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ment. Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."

It is noteworthy that the Courts of Appeals are not in agreement that the *Maybury* holding is an appropriate exercise of the supervisory power over federal district courts. See, *e. g.*, *United States* v. *West*, 549 F. 2d 545 (CA8), cert. denied, 430 U. S. 956 (1977).

[9] See *Arizona* v. *Washington*, 434 U. S. 497, 517 (1978) ("Review of any trial court decision is, of course, facilitated by findings and by an explanation of the reasons supporting the decision. No matter how desirable such procedural assistance may be, it is not constitutionally mandated in a case such as this").

[10] See *Morrissey* v. *Brewer*, 408 U. S. 471, 489 (1972); *Wolff* v. *McDonnell*, 418 U. S. 539, 564–565 (1974).

[11] Moreover, when other procedural safeguards have minimized the risk of unfairness, there is a diminished justification for requiring a judge to ex-

sary to assure compliance with the dictates of the Federal Constitution. Accordingly, the Court of Appeals erred when it directed the state trial judge to provide an explanation of the apparent inconsistency in his acquittal of Robinson and his conviction of respondent without first determining whether an inexplicably inconsistent verdict would be unconstitutional.[12]

II

Inconsistency in a verdict is not a sufficient reason for setting it aside. We have so held with respect to inconsistency between verdicts on separate charges against one defendant, *Dunn* v. *United States*, 284 U. S. 390 (1932),[13] and also with respect to verdicts that treat codefendants in a joint trial inconsistently, *United States* v. *Dotterweich*, 320 U. S. 277, 279 (1943).[14] Those cases, however, involved jury trials; as the Court of Appeals correctly recognized, both of those opin-

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plain his rulings. See *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458, 472 (1981) (STEVENS, J., dissenting).

[12] Our holding that the risk of constitutional error inherent in facially inconsistent bench trial verdicts is not substantial, see discussion *infra*, at 345–348, undercuts the initial premise of the Court of Appeals' analysis of the question whether a state prisoner is constitutionally entitled to an explanation of such verdicts.

[13] Accord, *Hamling* v. *United States*, 418 U. S. 87, 101 (1974). Cf. *Hartzell* v. *United States*, 322 U. S. 680, 682, n. 3 (1944) (the trial court's setting aside of the conspiracy convictions of petitioner's only alleged coconspirators "makes it impossible to sustain the petitioner's conviction upon . . . the conspiracy count"); but cf. *Standefer* v. *United States*, 447 U. S. 10 (1980) (a defendant accused of aiding and abetting in the commission of a federal offense may be convicted after the named principal has been acquitted of that offense in a previous trial).

[14] "Equally baseless is the claim of Dotterweich that, having failed to find the corporation guilty, the jury could not find him guilty. Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries. *Dunn* v. *United States*, 284 U. S. 390."

ions stressed the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons.[15] It is argued that a different rule should be applied to cases in which a judge is the factfinder.

Although *Dunn* and *Dotterweich* preclude a holding that inconsistency in a verdict is intolerable in itself, inconsistency nevertheless might constitute evidence of arbitrariness that would undermine confidence in the quality of the judge's conclusion. In this case, the Court of Appeals suggested the possibility that the trial judge might have relied on impermissible considerations such as the fact that neither respondent nor his wife testified, or knowledge of adverse information not contained in the record.[16] Undeniably, these possibilities exist, but they also would have existed if Robinson had been convicted or if he had been tried separately. In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions. It is equally routine for them to instruct juries that no adverse inference may be drawn from a defendant's failure to testify; surely we must presume that they follow their own instructions when they are acting as factfinders. We are not persuaded that an

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[15] Justice Holmes' opinion in *Dunn*, his last for the Court, characteristically was brief and to the point. He quoted the following passage from *Steckler* v. *United States*, 7 F. 2d 59, 60 (CA2 1925):

"'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'" *Dunn* v. *United States*, 284 U. S., at 393.

After citing *Horning* v. *District of Columbia*, 254 U. S. 135 (1920), he added:

"That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters." 284 U. S., at 393–394.

[16] See 643 F. 2d, at 94–95.

apparent inconsistency in a trial judge's verdict gives rise to an inference of irregularity in his finding of guilt that is sufficiently strong to overcome the well-established presumption that the judge adhered to basic rules of procedure.[17]

Other explanations for an apparent inconsistency are far more likely. Most apparent is the likelihood that the judge's actual observation of everything that transpired in the courtroom created some doubt about the guilt of one defendant that he might or might not be able to articulate in a convincing manner.[18] In this case, if the judge was convinced beyond a reasonable doubt that respondent and his wife were both guilty, it would be most unfortunate if a concern about the plausibility of a lingering doubt about Robinson should cause him to decide to convict all three rather than to try to articulate the basis for his doubt.

It is also possible that the judge may have made an error of law and erroneously assumed, for example, that Robinson should not be found guilty without evidence that he was to share in the proceeds of the larceny. There is no reason—and surely no constitutional requirement—that such an error pertaining to the case against Robinson should redound to the benefit of respondent.[19]

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[17] Cf. *Arizona* v. *Washington*, 434 U. S., at 518 (WHITE, J., dissenting): "[In *Townsend* v. *Sain*, 372 U. S. 293 (1963), the] Court concluded that 'the coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence . . . that there is reason to suspect that an incorrect standard was in fact applied.' *Id.*, at 314–315. A silent record is not a sufficient basis for concluding that the state judge has committed constitutional error; the mere possibility of error is not enough to warrant habeas corpus relief."

[18] In fact, the New York Supreme Court Justice who tried this case stated that he had a reasonable doubt as to Robinson's guilt. 643 F. 2d, at 90.

[19] See n. 7, *supra*.

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Even the unlikely possibility that the acquittal is the product of a lenity that judges are free to exercise at the time of sentencing but generally are forbidden to exercise when ruling on guilt or innocence, would not create a constitutional violation. We are aware of nothing in the Federal Constitution that would prevent a State from empowering its judges to render verdicts of acquittal whenever they are convinced that no sentence should be imposed for reasons that are unrelated to guilt or innocence. The Constitution does not prohibit state judges from being excessively lenient.

The question that respondent has standing to raise is whether his trial was fairly conducted. The trial judge, the New York appellate courts, the Federal District Court, and the United States Court of Appeals all agreed that the record contains adequate evidence of his guilt.[20] These courts also agreed that the proceedings leading up to respondent's conviction were conducted fairly. Apart from the acquittal of Robinson, this record discloses no constitutional error. Even assuming that this acquittal was logically inconsistent with the conviction of respondent, respondent, who was found guilty beyond a reasonable doubt after a fair trial, has no constitutional ground to complain that Robinson was acquitted.[21]

Reversed.

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[20] "The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached. Just as the standard announced today does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder—if known." *Jackson* v. *Virginia*, 443 U. S., at 319–320, n. 13.

[21] Cf. 643 F. 2d, at 94, n. 5 (rejecting respondent's equal protection challenge to the allegedly inconsistent verdicts). See also *North Carolina* v. *Pearce*, 395 U. S. 711, 722–723 (1969). Our conclusion that federal habeas corpus relief is not authorized in this case is buttressed by the practical problems with the Court of Appeals' holding even if some constitutional right of the convicted defendant were more clearly implicated. In *Henderson* v. *Kibbe*, 431 U. S. 145, 154, n. 13 (1977), we noted that such practi-

JUSTICE MARSHALL, dissenting.

I write separately to underscore my disapproval of what I perceive to be a growing and inexplicable readiness on the part of this Court to "dispose of" cases summarily. Perhaps this trend is due to what is often lamented as our "increasing caseload." Whatever the reason for this trend, I believe that it can only detract from this Court's decisions in deserving cases by consuming time and energy better spent elsewhere.

Moreover, by deciding cases summarily, without benefit of oral argument and full briefing, and often with only limited access to, and review of, the record, this Court runs a great risk of rendering erroneous or ill-advised decisions that may confuse the lower courts: there is no reason to believe that this Court is immune from making mistakes, particularly under these kinds of circumstances. As Justice Jackson so aptly put it, although in a somewhat different context: "We are not final because we are infallible, but we are infallible only because we are final." *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (concurring in result). I believe that this Court should reserve its final imprimatur for those cases to which we give plenary review, after full briefing and argument.

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cal problems are relevant in determining whether federal habeas relief is available:

"The strong interest in preserving the finality of judgments, [citations omitted], as well as the interest in orderly trial procedure, must be overcome before collateral relief can be justified. For a collateral attack may be made many years after the conviction when it may be impossible, as a practical matter, to conduct a retrial."

On remand from the federal habeas court, the state trial judge, if he is still on the bench, may not remember the criminal case, much less the reasons for convicting one codefendant but acquitting another. Confronted by defense counsel's assertion that the evidence of guilt was the same for both codefendants, he may well decide that he erroneously acquitted one codefendant; such a finding would have to satisfy the federal habeas court, but would hardly placate the habeas petitioner.

This is not to say that I believe that summary disposition is never appropriate. In my view, however, this Court should utilize this practice with more caution than has been true in the recent past.

TENNESSEE *v.* ARKANSAS

ON BILL OF COMPLAINT

No. 77, Orig. Decree entered December 14, 1981

DECREE

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The boundary line between the States of Tennessee and Arkansas in the area in controversy is fixed as geodetically described in Exhibit A, appended hereto, and as shown on Appendix E to the Special Master's Report filed with this Court on April 13, 1981. Said Exhibit E is incorporated by reference herein.

2. The costs of this proceeding shall be divided equally between the parties.

EXHIBIT "A"

TENNESSEE—ARKANSAS STATE BOUNDARY IN THE ELMOT BAR-ISLAND 30 SECTOR OF THE MISSISSIPPI RIVER

The following is a description, by geodetic position (North American Datum) of the locus of the Tennessee-Arkansas State Boundary that became fixed in the abandoned Fletcher Bend Channel that bounds Elmot Bar-Island 30 on the North and West. This boundary, lying between North Latitude 35° 40′ 30.8″ and North 35° 45′ 34.6″ and West Longitude 89° 52′ 35″ and West Longitude 89° 57′ 31.5″, begins at the head of Elmot Bar-Island 30 Chute Channel and thence runs Northwestward, Southwestward, Southward and Southeastward, along fixed (dead) thalweg and last steamboat navigation course in the abandoned Fletcher Bend Channel to the foot of Elmot Bar-Island 30 Chute Channel.

The Locus of the said Tennessee-Arkansas State Boundary is depicted on the 1973–1975 Mississippi River Hydrographic

Survey and is described as beginning at the head of the Elmot Bar-Island 30 Chute Channel at *Point P-1* at North Latitude 35° 44′ 30.8″ and West Longitude 89° 52′ 35″;

Thence North to *Point P-2*, Lat. 35° 44′ 16.8″ and Long. 89° 52′ 35″;

Thence Northward to *Point P-3*, Lat. 35° 44′ 28.7″ and Long. 89° 52′ 38″;

Thence Northwestward to *Point-4*, Lat. 35° 44′ 42″ and Long. 89° 53′;

Thence Northwestward to *Point-5*, Lat. 35° 45′ and Long. 89° 53′ 22″;

Thence Northwestward to *Point-6*, Lat. 35° 45′ 10″ and Long. 89° 53′ 35″;

Thence Northwestward to *Point-7*, Lat. 35° 45′ 17.8″ and Long. 89° 53′ 47″;

Thence Northwestward to *Point-8*, Lat. 35° 45′ 25.5″ and Long. 89° 54′;

Thence Northwestward to *Point-9*, Lat. 35° 45′ 34.6″ and Long. 89° 54′ 18″;

Thence Westward to *Point-10*, Lat. 35° 45′ 33.5″ and Long. 89° 54′ 30″;

Thence Southwestward to *Point-11*, Lat. 35° 45′ 29.7″ and Long. 89° 54′ 40″;

Thence Southwestward to *Point-12*, Lat. 35° 45′ 23.8″ and Long. 89° 54′ 47″;

Thence Southwestward to *Point-13*, Lat. 35° 45′ 15.6″ and Long. 89° 55′;

Thence Southwestward to *Point-14*, Lat. 35° 45′ and Long. 89° 55′ 30″;

Thence Southwestward to *Point-15*, Lat. 35° 44′ 46.5″ and Long. 89° 56′;

Thence Southwestward to *Point-16*, Lat. 35° 44′ 36.6″ and Long. 89° 56′ 20″;

Thence Southwestward to *Point-17*, Lat. 35° 44′ 27.9″ and Long. 89° 56′ 40″;

Thence Southwestward to *Point-18*, Lat. 35° 44′ 18.9″ and Long. 89° 57′;

Thence Southwestward to *Point-19*, Lat. 35° 44′ 10.1″ and Long. 89° 57′ 14″;

Thence Southwestward to *Point-20*, Lat. 35° 44′ and Long. 89° 57′ 23″;

Thence Southwestward to *Point-21*, Lat. 35° 43′ 39.2″ and Long. 89° 57′ 31″;

Thence Southward to *Point-22*, Lat. 35° 43′ 23.9″ and Long. 89° 57′ 31.5″;

Thence Southward to *Point-23*, Lat. 35° 43′ and Long. 89° 57′ 28.5″;

Thence Southward to *Point-24*, Lat. 35° 42′ 42.6″ and Long. 89° 57′ 25″;

Thence South to *Point-25*, Lat. 35° 42′ 21.3″ and Long. 89° 57′ 25″;

Thence Southward to *Point-26*, Lat. 35° 42′ and Long. 89° 57′ 23″;

Thence Southward to *Point-27*, Lat. 35° 41′ 43.6″ and Long. 89° 57′ 23.5″;

Thence Southward to *Point-28*, Lat. 35° 41′ 26.1″ and Long. 89° 57′ 21″;

Thence Southeastward to *Point-29*, Lat. 35° 41′ 11.4″ and Long. 89° 57′ 12″;

Thence Southeastward to *Point-30*, Lat. 35° 41′ and Long. 89° 57′ 03.5″;

Thence Southeastward to *Point-31*, Lat. 35° 40′ 56.4″ and Long. 89° 57′;

Thence Southeastward to *Point-32*, Lat. 35° 40′ 30.8″ and Long. 89° 56′ 34″ at the foot of the Elmot Bar-Island 30 Chute Channel.

CENTRAL TRUST CO., ROCHESTER, N. Y. *v.* OFFICIAL CREDITORS' COMMITTEE OF GEIGER ENTERPRISES, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80–1565. Decided January 11, 1982

Geiger Enterprises, Inc. (Geiger), filed a petition in Federal District Court seeking relief under Chapter XI of the Bankruptcy Act. Geiger continued operating its business as a debtor-in-possession, and numerous creditors filed claims. Thereafter, the Bankruptcy Reform Act of 1978 (New Code) became effective, and several of Geiger's wholly owned subsidiaries and affiliate corporations filed petitions for relief under Chapter 11 of the New Code. Geiger then moved in the Bankruptcy Court to dismiss its Chapter XI petition so that it could file a petition under Chapter 11 of the New Code. Petitioner secured creditor and the United States, which had a claim for unpaid taxes, opposed the motion on the ground that a dismissal was prohibited by § 403(a) of the New Code, which provides that a case commenced under the Bankruptcy Act "shall be conducted and determined under such Act as if [the New Code] had not been enacted" and "shall continue to be governed" by the Bankruptcy Act. The Bankruptcy Court, however, granted the motion, relying primarily on Bankruptcy Rule 11–42(a), which provides that a debtor may file a motion to dismiss a petition under Chapter XI of the Bankruptcy Act or to convert it to bankruptcy. The District Court reversed, but was in turn reversed by the Court of Appeals, which held that Rule 11–42(a) must be read in conjunction with § 403(a) to permit dismissal and refiling in certain cases, and that the operative test was whether the estate's interest would be served by such a procedure.

Held: The Court of Appeals' decision conflicts with § 403(a)'s plain meaning as well as its legislative history. Section 403(a) makes *no* exception for petitions to be refiled under the New Code. Nor does Rule 11–42(a) provide authority for the procedure. That Rule's language clearly contemplates a voluntary dismissal which results in an adjudication of bankruptcy or revests title of all property in the debtor and removes from it the protection of the bankruptcy laws. It does *not* contemplate a dismissal, such as the one here, which neither declares the debtor bankrupt nor restores the creditors' rights against the debtor's property, but simply holds matter in abeyance while the debtor files a petition under the New Code.

Certiorari granted; 635 F. 2d 106, reversed.

PER CURIAM.

On August 15, 1979, Geiger Enterprises, Inc. (Geiger), filed a petition in the United States District Court for the Western District of New York seeking relief under Chapter XI of the Bankruptcy Act of 1898 (formerly 11 U. S. C. § 701 *et seq.*) (Bankruptcy Act). Geiger continued operating its business as a debtor-in-possession, and numerous creditors filed claims, including a claim by the United States for $2,075,674.64 in unpaid taxes. Respondent Official Creditors' Committee was established by the Bankruptcy Court to represent the interests of creditors with relatively small claims.

On October 1, 1979, the Bankruptcy Reform Act of 1978, Pub. L. 95–598, 92 Stat. 2549, 11 U. S. C. § 101 *et seq.* (1976 ed., Supp. IV) (New Code), became effective. Thereafter, several of Geiger's wholly owned subsidiaries and affiliate corporations filed petitions for relief under Chapter 11 of the New Code. On January 9, 1980, Geiger moved to dismiss its Chapter XI petition on the representation that if dismissal were granted it too would immediately file a petition under Chapter 11 of the New Code and would seek substantive consolidation of its proceedings with the proceedings of its subsidiary and affiliate corporations.

This motion was opposed by petitioner, a secured creditor, and by the United States. Both opponents argued that such dismissal was prohibited by § 403(a) of the New Code, a transitional rule enacted by Congress to govern cases pending under the Bankruptcy Act on the effective day of the New Code. Section 403(a) provides:

> "A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if [the New Code] had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or

proceeding as if the [New Code] had not been enacted." 92 Stat. 2683, note preceding 11 U. S. C. § 101 (1976 ed., Supp. IV).

The Bankruptcy Court rejected this argument and granted the motion to dismiss Geiger's Chapter XI petition, relying primarily upon Rule 11–42(a) of the Rules of Bankruptcy Procedure, which provides:

> "Voluntary Dismissal or Conversion to Bankruptcy.
>
> "The debtor may file an application or motion to dismiss the case or to convert it to bankruptcy at any time prior to confirmation or, where the court has retained jurisdiction, after confirmation. On filing of such application or motion, the court shall . . . enter an order after hearing on notice dismissing the case or adjudicating him a bankrupt whichever may be in the best interest of the estate."

The Bankruptcy Court characterized this Rule as "unique in that the purpose of dismissal is to permit refiling under compatible substantive law provisions and [to] permit substantive consolidation," and found that consolidation of Geiger's proceedings with the proceedings of its subsidiaries and affiliates would "be in the best interest of this estate." App. to Pet. for Cert. A–11. Thus, on February 8, 1980, Geiger's original petition was dismissed and Geiger immediately filed a petition for relief under Chapter 11 of the New Code.

The United States District Court for the Western District of New York reversed. It held "the plain meaning of section 403(a)" to be "that the bankruptcy court must apply the [Bankruptcy] Act to cases filed prior to October 1, 1979 and that such cases shall proceed as if the New [Code] had never been enacted." *Id.*, at A–19.

On appeal, the District Court's decision was in turn reversed by the United States Court of Appeals for the Second Circuit. *In re Geiger Enterprises, Inc.*, 635 F. 2d 106 (1980). The Court of Appeals held "that Rule 11–42(a) must be read

in conjunction with section 403(a)" to permit dismissal and refiling in certain cases, and that "[t]he operative test is whether the estate's best interest will be served by" such procedure. *Id.*, at 109. The Court of Appeals qualified this test by holding that dismissal and refiling would be improper if they prejudiced the claims of the creditors, and remanded the case so that the Bankruptcy Court and District Court could consider the existence of actual prejudice.

Petitioner has sought review in this Court, arguing that the decision of the Court of Appeals "conflicts with the plain meaning of § 403(a) as well as its legislative history," and "provides a procedural device by which the clear Congressional intent is easily negated." Pet. for Cert. 9. We agree.

The language of § 403(a) is unequivocal. It provides that cases filed under the Bankruptcy Act "*shall* be conducted and determined under such Act as if [the New Code] had not been enacted." It makes *no* exception for petitions to be refiled under the New Code; indeed, it expressly provides that petitions such as Geiger's "*shall* continue to be governed" by the Bankruptcy Act. Any exception to this mandate recognized by the Court of Appeals is of wholly judicial creation, supported by neither the language of the New Code nor its legislative history.[1]

[1] The legislative history of the New Code supports the unequivocal language of § 403(a). The House Report on the New Code explained:

"The first phase of transition begins on October 1, [1979], the primary effective date of the bill. On that date, the new substantive law of bankruptcy as proposed by the bill will be put into effect. It will apply to all cases commenced on or after October 1, [1979]. The application of the new law will only be to new cases, however. Cases commenced before October 1, [1979], will continue to be governed by the Bankruptcy Act, as in effect September 30, [1979], and by all other applicable laws in effect on that date. Those cases will proceed as though this bill had not been enacted." H. R. Rep. No. 95–595, pp. 287–288 (1977) (footnotes omitted).

The same Report also states:

"[Section 403(a)] continues cases pending as of the effective date of the bill

Nor does Rule 11–42(a) provide authority for the procedure. The language of the Rule clearly contemplates a voluntary dismissal which results in an adjudication of the debtor's bankruptcy or one which revests title of all property in the debtor and removes from it the protection of the bankruptcy laws. It does *not* contemplate a dismissal, such as the one in this case, which neither declares the debtor bankrupt nor restores the creditors' rights against the debtor's property, but simply holds matters in abeyance while the debtor files its petition under a new law.[2] Even if it were

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without change. The new law will not affect cases commenced under the old law. Those cases will proceed as though this Act did not take effect. The section applies to substantive as well as procedural matters." *Id.*, at 459.

[2] Rule 11–42(a) provides that upon voluntary dismissal, the Bankruptcy Court will either "enter an order adjudicating the debtor a bankrupt," or will "enter an order . . . dismissing the case." If the latter order is entered, subdivision (d) of the Rule provides that "[a] certified copy of the order of dismissal under this rule shall constitute conclusive evidence of the revesting of the debtor's title to his property." Thus, if voluntary dismissal does not result in an adjudication of bankruptcy, it revests title to all property in the debtor and removes from it the protection of the bankruptcy petition. As one commentator has stated:

"It should be apparent that, upon dismissal, the debtor is placed exactly where he was before the Chapter XI case was filed and it is therefore unnecessary in the statute to provide for something so plain. When an order of confirmation in a Chapter XI [proceeding] is entered it has legal consequence and among the legal consequences is the revestment of title to property in the debtor, and of the divestment by the court of its jurisdiction over the debtor and its property wherever located. . . . Rule 11–42(d) merely makes plain not only that the debtor is revested with title to its property but, also, that a certified copy of the order of dismissal shall constitute conclusive evidence of that revestment. This, in effect, preserves to the creditors who have been informed of the dismissal under Rule 11–42(c), their remedies against the debtor's property." 14 W. Collier, Bankruptcy ¶ 11–42.07 (14th ed. 1976).

As is evident from this discussion, the dissent misperceives the purpose of Rule 11–42 when it argues that the Rule provides the mechanism by which the procedural and substantive commands of § 403(a) were satisfied

possible to so interpret Rule 11–42(a), the Rule would not modify the clear command of § 403(a). The Rules of Bankruptcy Procedure are applicable under the New Code *only* "to the extent not inconsistent with the amendments made by [the New Code]."[3] Transitional Rules § 405(d), 92 Stat. 2685. As interpreted by the Court of Appeals, Rule 11–42(a) clearly conflicts with § 403(a).

Thus, the Court of Appeals erred when it "amended" § 403(a) to permit refiling under the New Code if such refiling would not actually prejudice the creditors. That the Court of Appeals thought consolidation of Geiger's petition with those of its subsidiaries and affiliates would serve the best interests of the estate, or would conserve judicial resources, does not justify its disregard of a clear congressional directive. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it,

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in this case. The Rule authorizes only one kind of dismissal, one that results in a full discharge from bankruptcy. Geiger was not discharged from bankruptcy by the dismissal below. Rather, the dismissal was entered solely to permit Geiger to file under the New Code, that is, to permit it to avoid the prohibition of § 403(a).

[3] Section 405(d) of the Transitional Rules of the New Code provides:

"The [R]ules [of Bankruptcy Procedure] prescribed under section 2075 of title 28 of the United States Code and in effect on September 30, 1979, shall apply to cases under title 11, to the extent not inconsistent with the amendments made by this Act, or with this Act, until such rules are repealed or superseded by rules prescribed and effective under such section, as amended by section 248 of this Act." 92 Stat. 2685, note preceding 28 U. S. C. § 1471 (1976 ed., Supp. III).

Although this provision describes the Rules' effect on cases filed under the New Code, and thus does not directly apply to Geiger's first petition which was filed under the Bankruptcy Act, it clearly demonstrates Congress' intent that the old Bankruptcy Rules not override provisions of the New Code. Section 403(a) does apply to Geiger's original petition, and the Court of Appeals erroneously relied upon Rule 11–42(a) to override its clear command.

the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States*, 242 U. S. 470, 485 (1917). While the Court of Appeals may have reached a practical result, it was a result inconsistent with the unambiguous language used by Congress. Accordingly, the petition for a writ of certiorari is granted, and the judgment is reversed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

If a bankruptcy judge, with the consent of all parties to a proceeding commenced prior to October 1, 1979, correctly concluded that the best interest of the estate and all its creditors and the judiciary would be served by permitting the voluntary dismissal of that proceeding and the immediate commencement of a new proceeding under the New Code, would that action be prohibited by § 403(a) of the Bankruptcy Reform Act of 1978, Pub. L. 95–598, 92 Stat. 2683, note preceding 11 U. S. C. § 101 (1976 ed., Supp. IV)? I think not. Although two creditors objected to the dismissal in this case, the Court today leaves no doubt about its answer to this question. Despite its recognition that "the Court of Appeals may have reached a practical result," *ante*, this page, and that "consolidation of Geiger's petition with those of its subsidiaries and affiliates would serve the best interests of the estate [and] would conserve judicial resources," *ante*, at 359, the Court holds that Congress expressly forbade such a result when it enacted § 403(a).

It seems most unlikely that Congress would have commanded the result the Court reaches today if it had contemplated the set of facts confronting the Bankruptcy Court in this case. The purpose of the New Code was to modernize the bankruptcy laws and to make the system more workable and efficient. H. R. Rep. No. 95–595, pp. 3, 52 (1977). Per-

mitting Geiger to dismiss its petition under the Bankruptcy Act and to file a petition under the New Code, thereby facilitating consolidation of its petition with the petitions of its numerous affiliates and subsidiaries, is perfectly consistent with the spirit of both bankruptcy statutes.

Moreover, I believe that the Court of Appeals' holding is faithful to the language of § 403(a). That provision contains two commands relating to proceedings commenced prior to the effective date of the New Code; one command is procedural and the other is substantive. The procedural command requires that proceedings commenced prior to October 1, 1979, be conducted under the Bankruptcy Act.[1] The substantive command requires that the rights of the parties in such proceedings continue to be governed by that statute.[2]

The procedural command was followed in this case. The original petition was filed on August 15, 1979, and was dismissed pursuant to Rule 11–42(a) of the Rules applicable to cases commenced under the Bankruptcy Act. That Rule expressly authorizes a voluntary dismissal based upon a finding that such action is "in the best interest of the estate."[3] As

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[1] "A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if [the New Code] had not been enacted . . . ." 92 Stat. 2683, note preceding 11 U. S. C. § 101 (1976 ed., Supp. IV).

[2] Section 403(a) continues: "[A]nd the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the [New Code] had not been enacted."

[3] Rule 11–42(a) relating to voluntary dismissals provides in pertinent part:

"On the filing of such application or motion, the court shall . . . enter an order, after hearing on notice dismissing the case or adjudicating him a bankrupt whichever may be in the best interest of the estate."

In this case the Bankruptcy Judge, after a full hearing, made these findings:

"The motion is governed by the provisions of 11–42 of the Rules of Bankruptcy Procedure. It is unique in that the purpose of dismissal is to per-

the Court of Appeals noted, "the best interests of the estate must be interpreted to mean those of the creditors as well as the debtor,"[4] and whether dismissal of the original petition and refiling under the New Code is in the best interest of the creditors in this case is not clear from the record. The Court of Appeals instructed the Bankruptcy Court to consider on remand whether a refiling under the New Code and consolidation of the bankruptcy petitions of Geiger and its affiliates and subsidiaries would affect the creditors' substantive rights. If substantive rights of the creditors "are in fact materially prejudiced," *In re Geiger Enterprises, Inc.*, 635 F. 2d 106, 109 (CA2 1980), then dismissal of the originial petition will not be permitted. If dismissal is determined to be in the best interest of all parties, then such action is permitted by Rule 11–42(a); the procedural command of § 403(a), therefore, will have been satisfied.

Likewise, the Court of Appeals' disposition assures that the substantive command of § 403(a) will be followed. If dismissal is in the best interest of the estate, meaning in this case that the creditors' substantive rights are not materially prejudiced, then dismissal of the original petition is authorized by the Bankruptcy Act. In such a case, the creditors'

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mit refiling under compatible substantive law provisions and distribution rules and, thus, permit substantive consolidation. In opposing the motion, the parties have argued that Congress did not intend to permit this result. To the contrary, there is no reason to believe that the Congress even envisioned a problem such as that at hand.

"Practical, economical and expeditious administration and the avoidance of unnecessary and costly litigation by the alternative approach suggested by the Government [piercing the corporate veil of the affiliate and subsidiary corporations and bringing them under the Bankruptcy Act] render dismissal to permit refiling to be in the best interest of this estate." App. to Pet. for Cert. A–11.

[4] *In re Geiger Enterprises, Inc.*, 635 F. 2d 106, 109 (CA2 1980) (citing *Banque de Financement* v. *First National Bank of Boston*, 568 F. 2d 911, 921–922 (CA2 1977)).

substantive rights would have been governed by the Bankruptcy Act, not by the New Code. This satisfies the substantive command of § 403(a).

Even if I were persuaded that Congress intended to enact the inflexible rule the Court enforces today, I still would not decide that issue in this case. It is probable that the question raised by the certiorari petition would become moot if the Court were to follow its normal practice of declining to review interlocutory orders.[5] The United States, which has a $2,075,674.64 tax claim at stake, while agreeing with this Court's reading of § 403(a), recognizes that the question is of "limited administrative importance" and does not merit review by this Court.[6] The only practical consequence of the Court's holding is to impose unnecessary work on busy federal judges. The Bankruptcy Court and three Circuit Judges recognized that it would be more efficient to conduct a single consolidated proceeding rather than separate proceedings for a group of affiliated bankruptcy petitioners. Meanwhile, this Court expends its scarce time and energy in a case that at best involves an error that is harmless to the parties and the law.

I respectfully dissent.

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[5] Considering only one creditor, the United States, given the differences in treatment accorded tax claims under the two statutes, see 635 F. 2d, at 109, it is unlikely that the Bankruptcy Court would find that it is in the best interest of the Government to proceed under the New Code.

[6] In explaining why there is no need for this Court to grant certiorari, the Solicitor General stated:

"Despite the error of the decision below, we did not seek certiorari because of the absence of a conflict among the courts of appeals, the possibility that the government may prevail in the proceedings on remand, and the limited administrative importance of the question presented dealing with the transitional rules governing the enactment of the new Bankruptcy Code." Memorandum for United States 5.

369-168 O—82——31 : QL 3

BOAG *v.* MacDOUGALL, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-6845. Decided January 11, 1982

Petitioner state prisoner filed a crudely written *pro se* complaint in Federal District Court alleging wrongful solitary confinement in a certain prison facility. The District Court dismissed the complaint on the ground of mootness because petitioner in the meantime had been transferred to another facility. The Court of Appeals affirmed, but on the ground that the action was frivolous because it did not state a claim upon which relief could be granted.

Held: The Court of Appeals' ground for dismissing the complaint was erroneous as a matter of law. Federal courts must construe inartful pleading liberally in *pro se* actions, *Haines* v. *Kerner*, 404 U. S. 519, and, so construed, the complaint here states a cause of action.

Certiorari granted; 642 F. 2d 455, reversed and remanded.

PER CURIAM.

Petitioner, who was then an inmate of the Arizona Department of Corrections Reception and Treatment Center, filed a crudely written complaint in the United States District Court for the District of Arizona, in which he alleged, *inter alia*, that he had been placed in solitary confinement on March 3, 1980, without any notice of charges or any hearing, that he was threatened with violence when he asked what the charges were, and that he was still in "the hole" a week later. The District Court dismissed the complaint on the ground that the case was moot because petitioner had been transferred to another facility.

On appeal, the Court of Appeals did not endorse the District Court's mootness rationale, and rightfully so, since the transfer did not moot the damages claim. Nevertheless, the Court of Appeals affirmed, 642 F. 2d 455 (1981), concluding

that first, district courts have "especially broad" discretion to dismiss frivolous actions against prison officials under 28 U. S. C. § 1915(d), and second, petitioner's action is frivolous because it does not state a claim upon which relief can be granted. We need not address the permissible contours of the Court of Appeals' first conclusion, for its second conclusion is erroneous as a matter of law. Construing petitioner's inartful pleading liberally, as *Haines* v. *Kerner*, 404 U. S. 519 (1972), instructs the federal courts to do in *pro se* actions, it states a cause of action. See *Wolff* v. *McDonnell*, 418 U. S. 539, 555–572 (1974). On the basis of the record before us, we cannot find a sufficient ground for affirming the dismissal of the complaint.*

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for certiorari are granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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*Neither the Court of Appeals nor the District Court relied upon the argument advanced in the dissenting opinion. Indeed, the dissent's information that petitioner had attempted to file a dozen previous civil rights actions is not disclosed in the record, the opinions below, or the briefs filed with this Court. We recognize that 28 U. S. C. § 1915(d) vests the federal courts with broad discretion to take judicial notice of such information and to identify and dismiss frivolous complaints, but it does not appear from the papers before us that any such discretion was exercised by either the Court of Appeals or the District Court; both courts relied solely upon erroneous legal grounds for dismissing the complaint. We are in no position to decide, on the basis of these legal errors and this record, whether the argument advanced in the dissenting opinion would have "satisfied [the District Court] that the action is frivolous or malicious." 28 U. S. C. § 1915(d). A question of that character must be addressed in the first instance by the District Court. If a dismissal is to be based on the ground that petitioner failed to comply with the local rule, or that his prior filings justify the conclusion that his action is frivolous or malicious, a brief statement explaining that ground should be made by the District Court to facilitate intelligent appellate review.

JUSTICE O'CONNOR, concurring.

I join in the *per curiam*, but write separately to emphasize two points. First, nothing in the Court's opinion prevents the District Court on remand from dismissing this suit under 28 U. S. C. § 1915(d) if it finds grounds to believe that the complaint is "malicious or frivolous." This Court only requires the District Court to articulate briefly its reasons for dismissal in order to facilitate appellate review. Second, I find merit in JUSTICE REHNQUIST's comments that this Court is not equipped to correct every perceived error coming from the lower federal courts. The effectiveness of this Court rests in part on its practice of deciding cases of broad significance and of declining to expend limited judicial resources on cases, such as the present one, whose significance is limited to the parties. In exercising our discretionary certiorari jurisdiction, we should not be influenced solely by the merits of the petitioner's case.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

The *per curiam* reverses the decision of the Court of Appeals in this case because neither it nor the District Court articulated a proper basis for dismissing the petitioner's complaint. While I agree with the *per curiam's* conclusion that the case is not moot and that the complaint, construed liberally, alleges a cause of action, I find a sufficient basis to support the decision below. More importantly, I find this to be a good example of the kind of cases the Court should not decide.

The record shows that petitioner failed to comply with the local rules of the United States District Court for the District of Arizona, Phoenix Division, in which his complaint was filed. As part of his claim, petitioner filed a typewritten document entitled "Form To Be Used By Prisoner In Filing a Complaint Under The Civil Rights Act, 42 U. S. C. § 1983."

Section I of the document was headed "Previous Lawsuits," and subsection A required the plaintiff to answer:

> "Have you begun other lawsuits in state or federal court dealing with the same facts in this action or otherwise relating to your imprisonment? Yes (——) No (——)."

Petitioner failed to check either the "Yes" or the "No" space and did not answer the next seven questions about previous filings, thereby violating the local rules of the District Court. Rule 53(a), Local Rules of the United States District Court for the District of Arizona. There appears to have been good reason for this omission. Records of the District Court, of which we may take judicial notice, *Wells* v. *United States*, 318 U. S. 257, 260 (1943), indicate that petitioner had in the past filed at least 10 prisoner civil rights suits and had been denied leave to proceed *in forma pauperis* in at least 2 others.

In my view, the District Court was justified in dismissing the complaint, if for no other reason, on the ground that petitioner had simply refused to comply with local rules regarding the disclosure of previous lawsuits. The fact that neither lower court relied upon this ground for dismissal does not remove it from our consideration. A respondent may seek affirmance in this Court on *any* ground disclosed by the record which would not expand the relief granted. *United States* v. *New York Telephone Co.*, 434 U. S. 159, 166, n. 8 (1977); *Dandridge* v. *Williams*, 397 U. S. 471, 475, n. 6 (1970); *Ryerson* v. *United States*, 312 U. S. 405, 408 (1941). By reversing the decision below without first permitting the parties to brief the merits of this case, the *per curiam* precludes respondent from seeking affirmance on this or any other basis.

Even if there were no grounds for affirmance, I would find this case unworthy of the Court's attention. In our zeal to

provide "equal justice under law," we must never forget that this Court is not a forum for the correction of errors. As was said by Chief Justice Vinson:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Judgmts.' The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over the lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."*

It cannot be doubted that this case will have no importance beyond the facts and parties involved.

Finally, it is worth emphasizing what the Court is *not* saying in this case. The statutory provision under which petitioner was permitted to proceed *in forma pauperis*,

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*Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949 (quoted in R. Stern & E. Gressman, Supreme Court Practice 258–259 (5th ed. 1978)).

28 U. S. C. § 1915(d), expressly authorizes courts to dismiss such suits "if satisfied that the action is frivolous or malicious." This especially broad dismissal power, recognized in the footnote to the *per curiam*, safeguards the public and the courts from abuses of the *in forma pauperis* privilege by those who are not restrained by the costs of litigation. I do not read the *per curiam* as narrowing that power. Nor does the *per curiam* equate the dismissal power of § 1915(d) with that of Rule 12(b)(6) of the Federal Rules of Civil Procedure. Rather, the *per curiam* simply holds that the legal conclusions of the lower courts were erroneous. From reversal on that basis, in this case, I respectfully dissent.

HUTTO, DIRECTOR, VIRGINIA STATE DEPARTMENT OF CORRECTIONS, ET AL. *v.* DAVIS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-23. Decided January 11, 1982

Respondent was convicted in a Virginia state court of possessing with intent to distribute and distribution of nine ounces of marihuana, and was sentenced to 40 years in prison as authorized by Virginia law. After exhausting direct appeal, respondent brought an action in Federal District Court seeking a writ of habeas corpus on the ground that the 40-year sentence was so grossly disproportionate to the crime that it constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The District Court issued the writ, and, ultimately, the Court of Appeals affirmed, after its prior affirmance had been vacated by this Court and the case had been remanded for reconsideration in light of *Rummel* v. *Estelle*, 445 U.S. 263.

Held: By affirming the District Court's decision after this Court's decision in *Rummel*, *supra*—which stands for the proposition that federal courts should be reluctant to review legislatively mandated prison terms, and successful challenges to the proportionality of particular sentences should be exceedingly rare—the Court of Appeals sanctioned an intrusion into the basic line-drawing process that is properly within the province of legislatures, not courts. More importantly, the Court of Appeals ignored the hierarchy of the federal court system created by the Constitution and Congress.

Certiorari granted; 646 F. 2d 123, reversed and remanded.

PER CURIAM.

On October 26, 1973, law enforcement officers raided respondent's home and seized approximately nine ounces of marihuana and assorted drug paraphernalia. Several days before the raid, officers had tape-recorded a transaction in which respondent had sold marihuana and other controlled substances to a police informant. With the aid of the seized

evidence and the tape recording, respondent was convicted in Virginia state court of possession with intent to distribute and distribution of marihuana. The jury imposed a fine of $10,000 and a prison term of 20 years on each of the two counts, the prison terms to run consecutively. At the time of respondent's conviction, Virginia law authorized fines of up to $25,000 and prison terms of not less than 5 nor more than 40 years for each of respondent's offenses. *Davis* v. *Davis*, 585 F. 2d 1226, 1229 (CA4 1978).

After exhausting direct appeal, respondent brought a habeas action in the United States District Court for the Western District of Virginia, asserting that a 40-year sentence was so grossly disproportionate to the crime of possessing less than nine ounces of marihuana that it constituted cruel and unusual punishment as proscribed by the Eighth and Fourteenth Amendments. The District Court, relying primarily upon the four factors set forth in *Hart* v. *Coiner*, 483 F. 2d 136 (CA4 1973), cert. denied, 415 U. S. 938 (1974), agreed:

> "After examining the nature of the offense, the legislative purpose behind the punishment, the punishment in the Commonwealth of Virginia for other offenses, and the punishment actually imposed for the same or similar offenses in Virginia, this court must necessarily conclude that a sentence of forty years and twenty thousand dollars in fines is so grossly out of proportion to the severity of the crimes as to constitute cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution." *Davis* v. *Zahradnick*, 432 F. Supp. 444, 453 (1977).

Accordingly, the District Court issued a writ of habeas corpus.

A panel of the United States Court of Appeals for the Fourth Circuit reversed. *Davis* v. *Davis*, *supra*. The

panel correctly noted that this Court "has never found a sentence for a term of years within the limits authorized by statute to be, by itself, a cruel and unusual punishment," 585 F. 2d, at 1229, and held that respondent had failed to show that his sentence, in light of the factors known to the jury[1] and the punishment authorized by Virginia, was sufficiently extraordinary to violate the Eighth and Fourteenth Amendments. *Id.*, at 1233. The decision was short-lived. Sitting en banc, the Court of Appeals reheard the case and, "for reasons sufficiently stated by the district judge in his opinion," affirmed the award of habeas relief. *Davis* v. *Davis*, 601 F. 2d 153, 154 (1979). We granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case for reconsideration in light of our decision in *Rummel* v. *Estelle*, 445 U. S. 263 (1980). *Sub nom. Hutto* v. *Davis*, 445 U. S. 947 (1980). The Court of Appeals again affirmed the District Court, this time by an equally divided vote. *Davis* v. *Davis*, 646 F. 2d 123 (1981). Because the Court of Appeals failed to heed our decision in *Rummel*, we now reverse.

The petitioner in *Rummel* was sentenced to life imprisonment under the Texas recidivist statute upon being convicted of his third felony: obtaining $120.75 by false pretenses. He had previously been convicted of passing a forged check in the amount of $28.36, and of fraudulently using a credit card to obtain $80 worth of goods or services. 445 U. S., at 265–266. Like the respondent in this case, Rummel argued that the length of his imprisonment was so "grossly disproportionate" to the crime for which he was sentenced that it violated the ban on cruel and unusual punishment of the

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[1] In addition to the evidence seized during the raid and the tape recording of the drug transaction, all of which demonstrated that respondent was an active drug dealer, the jury knew from evidence presented at trial that respondent had knowingly sold drugs to be smuggled into prison, had sold drugs to an inmate's wife who was alone with an infant child, and had himself been imprisoned in the past. *Davis* v. *Davis*, 585 F. 2d, at 1227–1228.

Eighth and Fourteenth Amendments. In rejecting that argument, we distinguished between punishments—such as the death penalty—which by their very nature differ from all other forms of conventionally accepted punishment, and punishments which differ from others only in duration. This distinction was based upon two factors. First, this "Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices." *Id.*, at 275. And second, the excessiveness of one prison term as compared to another is invariably a subjective determination, there being no clear way to make "any constitutional distinction between one term of years and a shorter or longer term of years." *Ibid.* Thus, we concluded that "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, . . . the length of the sentence actually imposed is purely a matter of legislative prerogative." *Id.*, at 274. Accordingly, we held that Rummel's life sentence did not violate the constitutional ban on cruel and unusual punishment.

As mentioned above, the District Court found respondent's sentence to be unconstitutional by applying the four-part test of *Hart* v. *Coiner*, *supra*. *Hart* also was relied upon by the lower-court dissenters in *Rummel*, and was implicitly disapproved by our rejection of the dissenters' view. Not only did we expressly recognize *Hart* as the primary opposing authority, 445 U. S., at 267, 269, but our opinion also disapproved each of its four "objective" factors.[2] Because the District Court's grant of habeas relief was clearly guided by these factors, the Court of Appeals erred in affirming.

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[2] Applying the first *Hart* factor to this case, the District Court found "no element of violence and minimal, debatable danger to the person." *Davis* v. *Zahradnick*, 432 F. Supp. 444, 452 (WD Va. 1977). In *Rummel*, however, we noted that "the presence or absence of violence does not always

In short, *Rummel* stands for the proposition that federal courts should be "reluctan[t] to review legislatively mandated terms of imprisonment," *id.* at 274, and that "successful challenges to the proportionality of particular sentences" should be "exceedingly rare," *id.* at 272.[3] By affirming the District Court decision after our decision in *Rummel*, the Court of Appeals sanctioned an intrusion into the basic line-drawing process that is "properly within the province of legislatures, not courts." *Id.*, at 275–276. More importantly, however, the Court of Appeals could be viewed as having ig-

affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal." 445 U. S., at 275. *Hart*'s second factor calls for an examination of the purposes behind the criminal statute and the existence of less restrictive means of effectuating those purposes. On this factor the District Court was inconclusive, but noted that the amount of marihuana involved was less than nine ounces, implying that such minimal possession could adequately be deterred with shorter prison sentences. 432 F. Supp., at 452. Such analysis was implicitly rejected by our conclusion in *Rummel* that the "'small' amount of money taken" was inapposite, because to acknowledge that the State could have given Rummel a life sentence for stealing *some* amount of money "is virtually to concede that the lines to be drawn are indeed 'subjective,' and therefore properly within the province of legislatures, not courts." 445 U. S., at 275–276. Applying the third *Hart* factor, the District Court found that respondent's sentence for possession with intent to distribute exceeded the maximum penalty available for that offense in all but four States, and that his sentence for distribution exceeded the maximum penalty available for that offense in all but eight States. 432 F. Supp., at 452–453. We rejected such comparison in *Rummel*, stating that "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." 445 U. S., at 282. Finally, the fourth *Hart* factor led the District Court to conclude that respondent's sentence was disproportionate when compared to punishments applicable to other offenses under Virginia law. 432 F. Supp., at 453. This comparison was rejected in *Rummel* because "[o]ther crimes . . . implicate other societal interests, making any such comparison inherently speculative." 445 U. S., at 282, n. 27.

[3] We noted in *Rummel* that there could be situations in which the proportionality principle would come into play, such as "if a legislature made overtime parking a felony punishable by life imprisonment." *Id.*, at 274, n. 11.

nored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. Admittedly, the Members of this Court decide cases "by virtue of their commissions, not their competence." And arguments may be made one way or the other whether the present case is distinguishable, except as to its facts, from *Rummel*. But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.

Accordingly, the petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded to the District Court with instructions to dismiss respondent's habeas petition.

It is so ordered.

JUSTICE POWELL, concurring in the judgment.

The Court holds that the Eighth Amendment countenances a prison term of 40 years and a fine of $20,000 for respondent's possession and distribution of approximately nine ounces of marihuana said to have a street value of about $200. I view the sentence as unjust and disproportionate to the offense. Nevertheless, for the reasons stated below I reluctantly conclude that the Court's decision in *Rummel* v. *Estelle*, 445 U. S. 263 (1980), is controlling on the facts before us. Accordingly, I join the judgment only.

I

The respondent Davis met Eads in prison. During Eads' confinement, his wife had become a drug user. Concerned about this development and its effect on their 2-year-old child, Eads offered to cooperate with the police "to assist in the exposure and arrest of those supplying drugs to his wife and any illicit drug distributor in the area, including Davis who Eads identified as an active drug dealer in Wythe County." *Davis* v. *Davis*, 585 F. 2d 1226, 1228 (CA4 1978).

On furlough from prison, Eads told Davis he wished to buy drugs for himself and some mutual friends currently in prison. Shortly thereafter, the two went to Davis' home where Davis sold Eads three ounces of marihuana for $74. Davis also gave Eads "drug pills which included L. S. D and another illicit controlled drug." *Ibid.* A police raid on Davis' home later uncovered about six ounces of marihuana, two scales, and other drug paraphernalia.

Davis was found guilty of both distributing marihuana and of possessing marihuana with intent to distribute. On each count, he received a sentence of 20 years' imprisonment and a $10,000 fine. These sentences were imposed on a consecutive basis. The District Court granted his petition for a writ of habeas corpus because the sentences were "so grossly out of proportion to the severity of the crimes as to constitute cruel and unusual punishment . . . ."[1] This judgment was reversed on appeal, *Davis* v. *Davis*, *supra*, but reinstated by the Court of Appeals on rehearing en banc.[2] We remanded for reconsideration in light of our decision in *Rummel* v. *Estelle*, *supra*.[3] By an equally divided vote en banc, the Court of Appeals again affirmed.[4]

II

The sole authority upon which the Court today relies is its decision in *Rummel* v. *Estelle*. *Rummel* decided that the Eighth Amendment's proscription of cruel and unusual punishments[5] was not transgressed by the imposition of life imprisonment for a recidivist's third felony, each a nonviolent fraud involving less than $125. The Court also observed, however:

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[1] *Davis* v. *Zahradnick*, 432 F. Supp. 444, 453 (WD Va. 1977).

[2] *Davis* v. *Davis*, 601 F. 2d 153 (CA4 1979).

[3] *Hutto* v. *Davis*, 445 U. S. 947 (1980).

[4] *Davis* v. *Davis*, 646 F. 2d 123 (CA4 1981).

[5] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

> "This is not to say that a proportionality principle [*viz.*, that grossly disproportionate punishments are unconstitutional] would not come into play in the extreme example mentioned by the dissent, *post*, at 288, if a legislature made overtime parking a felony punishable by life imprisonment." 445 U. S., at 274, n. 11.

The *Rummel* Court therefore did not reject the proportionality principle long settled by our cases.[6] It did take such a restricted view of the principle that—in the future—appellate courts, duty bound to follow the decision of this Court, often will be compelled to accept sentences that arguably are cruel and unusual.

I recognize, of course, that under our system the limits of a prison sentence normally are a matter of legislative prerogative, and trial courts have the primary responsibility to determine an appropriate sentence—within these limits—in light of the facts and circumstances of the particular case. Review of sentencing is not generally a function of appellate review. Yet, our system of justice always has recognized that appellate courts *do* have a responsibility—expressed in the proportionality principle—not to shut their eyes to grossly disproportionate sentences that are manifestly unjust. I therefore have no criticism of the District Court or the Court of Appeals for exercising this responsibility and reaching the judgments that are reversed here today.

There are features of this case that arguably distinguish it from *Rummel*. I identify these briefly. The first is a letter from the Commonwealth Attorney who successfully prosecuted Davis. The letter is set forth in full below.[7] It was

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[6] *E. g.*, *Coker* v. *Georgia*, 433 U. S. 584 (1977); *Weems* v. *United States*, 217 U. S. 349 (1910).

[7] The letter from the Commonwealth Attorney to Davis' attorney reads as follows:

"This will confirm our recent telephone conversation wherein I advised I would pose no objection to the release of Mr. Davis from the Virginia penal system on a suspended term basis.

[Footnote 7 is continued on p. 378]

solicited by Davis' lawyer, some three years after Davis had commenced to serve his 40-year term. One can say, of course, that such a letter often can be obtained from a prosecutor who may have second thoughts as to the justness of a sentence he had sought at trial. I normally would give little weight to such a letter. But the prosecutor here, in a thoughtful letter, did advance a nonfrivolous reason for his conclusion that Davis' sentence was a "gross injustice." He referred to the "grave disparity in sentencing" in comparable drug offenses in the "Commonwealth [of Virginia] and the nation."[8]

"Heretofore, I have steadfastly opposed his release. However, the sentences now being imposed throughout the majority of the Commonwealth and the nation for *comparable* acts of drug distribution are extremely light and in most cases insignificant. In view of such, I think a *gross injustice* would be done should I not recommend his immediate release with the remainder of his term suspended.

"I do wish to make it expressly clear that my recommendation should not be construed as being critical of the jury that convicted Mr. Davis. I actually asked for a heavier sentence than was imposed. The citizens of this county have not softened their views toward drug offenders, and neither have I, but by the same token I cannot condone *such grave disparity in sentencing*.

"I think our community, our jury, and our Court were correct in their approach to the drug problem. However, that we may be correct and others wrong in their assessment, does not enable me to continue to ignore the wrong that would be perpetuated upon Mr. Davis by his continued confinement. My [conscience] dictates that in view of the lack of any semblance of uniformity of sentencing throughout the nation in dealing with the drug problem, that Mr. Davis's continued incarceration is *grossly unjust*.

"I trust that this is a fair summary of the content of our conversation, and if it is not, I hope you will please advise me." Letter of Feb. 28, 1977 (emphasis added).

In the District Court, the parties stipulated that, had this prosecutor testified "with respect to the severity of the sentences imposed upon Petitioner for marijuana-related offenses, his testimony would comport with the contents of the attached letter . . . ." Supplemental Stipulation of Fact, Mar. 18, 1977.

[8] Davis also prepared a study of drug-related sentencing in Virginia over a 9½-month period in 1975–1976. This study summarized sentencing of 117

The second and more important factor that arguably distinguishes *Rummel* is the action of the Virginia State Legislature in 1979. It then reduced the maximum penalty for offenses of which Davis was convicted to 10 years on each count—regardless of aggravating circumstances. See Va. Code § 18.2–248.1(a)(2) (Supp. 1981) and § 18.2–10(e) (1975). This *maximum* is less than half the sentence Davis received. Because it sets a maximum, the legislative action takes all relevant aggravating circumstances into account. This reduction—five years after Davis' conviction and two years after his prosecutor's letter—evidences Virginia's present sentencing judgment that marihuana possession and distribution in small amounts no longer would justify Davis' sentence.[9] Although this change in law was not made retroactive, it is evidence from the most authoritative state source that Davis' sentence was unjust and no longer would be valid.

III

Based on this evidence of comparative sentencing and the relatively minor degree of Davis' criminality, affirmance of the judgment of the Court of Appeals arguably could be justified. I conclude, however, that *Rummel* requires reversal. Davis was convicted of distributing marihuana, and had dealt in other drugs as well. He was willing to sell marihuana for

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inmates convicted of possessing, selling, or manufacturing marihuana. The average of these sentences was three years, two months. The maximum—for any quantity—was 15 years. I give this study only slight weight because of its short time period and its failure to give information about relevant aggravating circumstances.

[9] *Rummel* also involved a legislative revision of the relevant crimes. The basis for Rummel's life sentence was his conviction as a habitual offender. After conviction for two prior felonies, this habitual offender law provided for automatic imposition of a life sentence upon a third felony conviction. 445 U. S., at 278. Rummel's third felony was theft by false pretext. After his conviction on that count and as a habitual offender, Texas reclassified his third offense as a misdemeanor. *Id.*, at 295. Unlike Virginia's 1979 amendment with respect to Davis, however, Texas' statutory reduction did not convey any basic change in its attitude toward the statutory basis for Rummel's lengthy sentence: recidivism.

369-168 O—82——32 : QL 3

use by prison inmates and "probably as well to the wife of an inmate left alone with an infant child." 585 F. 2d, at 1233. He previously had been sentenced on a drug-related offense.[10] By comparison, Rummel's offenses—three minor frauds involving almost trifling sums of money—were far less serious. Rummel's sentence, moreover, was *more* severe than Davis'. And Davis has been unable to show—by means of statutory comparisons—that his sentences suffer from a greater degree of disproportionality than Rummel's did. Compare *Davis* v. *Zahradnick*, 432 F. Supp. 444, 452–453 (WD Va. 1977), with 445 U. S., at 296–302.

These cases illustrate the seriousness of the disparity in sentencing that may distinguish our system of justice from other mature systems. Sentencing disparity in our country primarily results not from varying statutory limits among the States. Rather, in a nation of our size and with the sentencing decision in particular cases vested—as it should be—in trial courts, a good deal of disparity is inevitable. Effort to minimize this, at least on a state-by-state basis, certainly should be continued. Nor should reform in this respect be addressed only to prevent excessive penalties. The criticism of courts occurs more frequently, often fully justified, when persons guilty of crimes of violence, or serious drug distribution offenses, are given sentences that are disproportionately light in view of their offenses, as well as disparate in compari-

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[10] "While not given all the details, the jury knew from Eads' testimony that this was not Davis' first trouble with the law in a drug related offense." *Davis* v. *Davis*, 585 F. 2d 1226, 1228 (CA4 1978). "[T]he trial judge, who could have sentenced concurrently, sentenced consecutively. Not only had he heard the witnesses testify, which we have not; he knew, for example, which the jury did not, that Davis previously had been convicted of selling LSD, and that the two offenses for which Davis had just been found guilty were committed while on bail pending appeal from the previous conviction for selling LSD." *Id.*, at 1233. Cf. *Vines* v. *Muncy*, 553 F. 2d 342, 349 (CA4 1977) (jury sentence not final under Virginia practice, since its findings are subject to suspension by the trial judge).

son with other sentences. Sentencing that is just should take into account the paramount interest of society in being protected from criminal conduct as well as the right of convicted persons to be dealt with fairly according to law.

I join the judgment of the Court.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

The increasingly alarming penchant of the Court inappropriately to invoke its power of summary disposition could not be more evident than in this case. With the benefit of neither full briefing nor oral argument, the Court holds that *Rummel* v. *Estelle*, 445 U. S. 263 (1980), precluded the courts below from holding that respondent has been subjected to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Rummel considered whether the application of the Texas habitual offender statute to petitioner William Rummel constituted cruel and unusual punishment in violation of the Eighth Amendment. The Texas statute prescribed a mandatory life sentence following a third conviction on a felony charge. Rummel became subject to this provision in 1973, when he was convicted of obtaining $120.75 by false pretenses, then a felony under Texas law. On two earlier occasions, Rummel had been convicted of felonies under Texas law: in 1964 for fraudulently using a credit card to obtain $80 worth of goods or services, and in 1969 for passing a forged check in the amount of $28.36. Rummel argued that the imposition of a mandatory life sentence in his case amounted to cruel and unusual punishment in violation of the Eighth Amendment, as applied to the States through the Fourteenth Amendment, see *Robinson* v. *California*, 370 U. S. 660, 667 (1962). The Court rejected Rummel's constitutional attack. While noting that "one could argue . . . that for crimes concededly classified and classifiable as felonies, . . . the length

of the sentence actually imposed is purely a matter of legislative prerogative," 445 U. S., at 274, the Court adopted a much narrower basis for decision, holding that, in the context of Texas' habitual offender statute, the imposition of a life sentence on Rummel served the legitimate state interests of deterring recidivism and of segregating habitual offenders "from the rest of society for an extended period of time." *Id.*, at 284. Because this narrower ground was chosen, the Court found it unnecessary to decide whether the Eighth Amendment would have been violated if, in the absence of the habitual offender statute, a life sentence had been imposed on Rummel "merely for obtaining $120.75 by false pretenses." *Id.*, at 276. The Court stated in this respect:

> "[T]he interest of the State of Texas here is not simply that of making criminal the unlawful acquisition of another person's property; it is in addition the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law. By conceding the validity of recidivist statutes generally, Rummel himself concedes that the State of Texas, or any other State, has a valid interest in so dealing with that class of persons." *Ibid.*

Relying on *Rummel*, the *per curiam* suggests that because the punishment imposed on respondent was within the maximum prescribed by the state legislature, the Court of Appeals, which affirmed the District Court's grant of habeas relief on Eighth Amendment grounds, "sanctioned an intrusion into the basic line-drawing process that is 'properly within the province of legislatures, not courts.'" *Ante*, at 374, quoting *Rummel*, *supra*, at 275–276. Even if I viewed *Rummel* as properly decided, and I do not, the *per curiam*, by suggesting that it was improper for the courts below to engage in a disproportionality analysis, represents a serious

and improper expansion of *Rummel*. *Rummel* acknowledged that prior decisions of this Court, see, *e. g.*, *Ingraham* v. *Wright*, 430 U. S. 651, 667 (1977); *Trop* v. *Dulles*, 356 U. S. 86 (1958) (plurality opinion); *Weems* v. *United States*, 217 U. S. 349 (1910), recognized that the Eighth Amendment includes a principle of proportionality that requires the invalidation of a sentence that is "grossly disproportionate to the severity of the crime," *Rummel*, *supra*, at 271–272. *Rummel* did not overrule those cases but cited them approvingly.[1] *Rummel* rests on the understanding that, as a consequence of the overwhelming state interests in deterring habitual offenders, the Eighth Amendment does not preclude a State from imposing what *might otherwise constitute a disproportionate prison sentence* on an individual determined under state law to be a habitual offender. Of course, in the instant case, the Commonwealth of Virginia has expressed no will to punish Davis as a habitual offender, and there has been no determination that he is one.

The *per curiam* nevertheless reverses the judgment below on the basis that "*Rummel* stands for the proposition that federal courts should be 'reluctan[t] to review legislatively mandated terms of imprisonment' . . . and that 'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare.'" *Ante*, at 374, quoting *Rummel*, *supra*, at 274, 272. But this general principle of deference surely cannot justify the complete abdication of our responsibility to enforce the Eighth Amendment. The question presented here is whether the sentence imposed on respondent *in this case* comports with the limitation contained

[1] That there should be any doubt as to the continued validity of the proportionality principle is particularly incomprehensible in view of the *Rummel* Court's reliance on the proportionality principle in a footnote, where the Court, responding to the fanciful hypothetical of the dissent, stated that this principle would bar a legislature from making "overtime parking a felony punishable by life imprisonment." 445 U. S., at 274, n. 11.

in the Eighth Amendment. To reverse on the basis of *Rummel*, the Court must *at least* demonstrate why this is not one of those "exceedingly rare" cases in which the Eighth Amendment invalidates a sentence as disproportionate. But the *per curiam* engages in no such analysis.[2] We may be sure, however, that the Court of Appeals, directed to reconsider this case in light of *Rummel*, *did* undertake that analysis—upon full review and with the benefit of a substantial record, oral argument, and briefs.

It is obvious to me, as it apparently was to at least five judges of the Court of Appeals, that this case is one of those "exceedingly rare" cases in which a sentence should be invalidated on Eighth Amendment grounds. First, the indications are that the punishment imposed on respondent for the possession and distribution of less than nine ounces of marihuana—40 years' imprisonment and fines of $20,000—is not simply harsh, but is in cruel and painful excess of the punishments imposed by the Virginia courts on other defendants convicted of similar offenses. As the District Court noted:

> "From October 31, 1975 to August, 1976 one hundred and seventeen (117) inmates were committed to the State Department of Corrections for possessing, selling, or manufacturing marijuana. The average sentence for

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[2] The *per curiam* notes that the District Court applied the four-factor proportionality test of *Hart* v. *Coiner*, 483 F. 2d 136 (CA4 1973). *Ante*, at 371, 373, and n. 2. It then suggests that the test is inconsistent with the decision in *Rummel* and that reversal is therefore appropriate here. Even if the Court were correct in its suggestion that the *Hart* test is inconsistent with *Rummel*, reversal would not be appropriate, because there is simply no basis for saying that the judgment of the Court of Appeals rests on the *Hart* test. The Court of Appeals, sitting en banc, affirmed the judgment of the District Court by an equally divided court, and therefore did not issue an opinion. Accordingly, the five judges of the Court of Appeals that voted to affirm the judgment of the District Court may have based their view of the unconstitutionality of Davis' punishment on reasoning entirely unrelated to that offered by the District Court—particularly since the District Court's opinion had been issued prior to *Rummel*. In

> these offenses was three years and two months, the minimum was sixty days, and the maximum was fifteen years." *Davis* v. *Zahradnick*, 432 F. Supp. 444, 453 (WD Va. 1977).

Second, this case is unique in that the very prosecutor who brought the charges against the respondent was forced to concede in light of his experience that the case represents a "grave disparity in sentencing," and that the continued incarceration of Davis "is grossly unjust."[3] Finally, by its subse-

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any event, this Court reviews judgments, not opinions, and therefore the Court can reverse the judgment of the Court of Appeals only if it is not sustainable on any basis.

[3] The prosecutor's comments were contained in the following letter that he sent to Davis' attorney:

"This will confirm our recent telephone conversation wherein I advised I would pose no objection to the release of Mr. Davis from the Virginia penal system on a suspended term basis.

"Heretofore, I have steadfastly opposed his release. However, the sentences now being imposed throughout the majority of the Commonwealth and the nation for comparable acts of drug distribution are extremely light and in most cases insignificant. In view of such, I think a gross injustice would be done should I not recommend his immediate release with the remainder of his term suspended.

"I do wish to make it expressly clear that my recommendation should not be construed as being critical of the jury that convicted Mr. Davis. I actually asked for a heavier sentence than was imposed. The citizens of this county have not softened their views toward drug offenders, and neither have I, but by the same token I cannot condone such grave disparity in sentencing.

"I think our community, our jury, and our Court were correct in their approach to the drug problem. However, that we may be correct and others wrong in their assessment, does not enable me to continue to ignore the wrong that would be perpetrated upon Mr. Davis by his continued confinement. My conscious *[sic]* dictates that in view of the lack of any semblance of uniformity of sentencing throughout the nation in dealing with the drug problem, that Mr. Davis's continued incarceration is grossly unjust.

"I trust that this is a fair summary of the content of our conversation, and if it is not, I hope you will please advise me." Letter from Thomas B. Baird, Jr., to Edward L. Hogshire (Feb. 28, 1977).

quent action, the Virginia Legislature has implicitly indicated that it views the punishment imposed on the respondent as too severe: in 1979 it reduced from 40 years to 10 years the maximum sentence that can be imposed with respect to each of the two offenses for which the respondent was convicted. See Va. Code § 18.2–248.1(a)(2) (Supp. 1981); § 18.2–10(e) (1975). Under the current statute, respondent could, at maximum, be sentenced to 20 years' imprisonment—two consecutive 10-year terms. This legislative reappraisal of criminal punishment for marihuana offenses does not necessarily render unconstitutional respondent's substantially longer term. But it plainly confirms the views of the courts below, which I share, that the punishment inflicted on Davis is unconstitutionally disproportionate and unsupported by any considered legislative judgment that the punishment inflicted is appropriate for the offenses committed.[4] See *Coker* v. *Georgia*, 433 U. S. 584, 597 (1977) (plurality opinion) ("[T]he legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman"). See also *Trop* v. *Dulles*, 356 U. S., at 101 ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"). For these three reasons, and in the absence of full briefing or oral argument, I think that the judgment below—that Davis has indeed been subjected to cruel and unusual punishment—is not an unreasonable one.[5]

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[4] This legislative action also undermines any claim that the state interest in having Davis serve a 40-year prison sentence is sufficiently strong to preclude invalidation of the sentence as disproportionate under the Eighth Amendment. See *supra*, at 381–383.

[5] JUSTICE POWELL, concurring in the judgment, nevertheless concludes that the punishment imposed on Davis is not as disproportionate as that imposed on Rummel and that therefore the instant case is controlled by the facts of *Rummel*. *Ante*, at 379–380. But even if the punishment in the instant case could be determined, in the abstract, to be less severe than

Today's decision is profoundly disturbing not only because the Court has misused precedent in order to place its imprimatur on a punishment that the courts below have determined, with ample justification, to be cruel and unusual, but also because it represents yet another instance of this Court's "growing and inexplicable readiness . . . to 'dispose of' cases summarily." *Harris* v. *Rivera*, *ante*, at 349 (MARSHALL, J., dissenting). I am, of course, cognizant that, because of an ever-increasing docket, the Court has come under extraordinary pressure to accelerate its disposition process. But I do not believe that summary disposition on the basis of the certiorari papers is a proper response to such pressure[6] where, as here, it is employed to change or extend the law in significant respects. Here, the Court reverses the judgment of the Court of Appeals, which had the benefit of our decisions, a concrete record, and a thoughtful Dis-

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that imposed on Rummel, the fact remains that Rummel was sentenced as a habitual offender and this Court determined the State's interest in imposing unusually harsh sentences on habitual offenders to be a substantial one. No comparable state interest has been offered to support the punishment inflicted here. Although it may be true that the respondent in the instant case has previously been convicted of a drug offense, he was not sentenced as a habitual offender, but for possession and distribution of less than nine ounces of marihuana. Indeed, while the trial judge, who made consecutive the jury's recommended sentences of 20 years on each count, was *aware* of the respondent's prior conviction, the jury, which awarded the sentences, was *unaware* that the respondent had previously been convicted. See *Davis* v. *Davis*, 585 F. 2d 1226, 1233 (CA4 1978).

[6] Indeed, an increased rate of summary dispositions may prove to be counterproductive. As the bar becomes alert to the increased probability of summary disposition, lawyers responding to a petition for certiorari will likely choose to minimize the risk of summary disposition by taking the additional step of providing a full statement of their argument on the merits. As others have noted, this will only "mean additional and unnecessary work for the lawyer, expense to the client, and unessential reading matter for the already overburdened Court." R. Stern & E. Gressman, Supreme Court Practice 365 (5th ed. 1978). Accord, Brown, Foreword: Process of Law, 72 Harv. L. Rev. 77, 81–82 (1958).

trict Court opinion. And the Court does so in a context in which the Court of Appeals affirmed by an equally divided court, without opinion; there is accordingly no statement of law below that requires correcting. I can only believe that the Court perceives this case as one in which the narrow *Rummel* ruling concerning recidivist statutes can be extended to new terrain without the necessary exertion of argument and briefing. Unfortunately, it is Roger Trenton Davis who must now suffer the pains of the Court's insensitivity, and serve out the balance of a 40-year sentence viewed as cruel and unusual by at least six judges below. I dissent from this patent abuse of our judicial power.[7]

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[7] In view of this abuse, it is certainly startling that the Court should suggest that the Court of Appeals' affirmance of the District Court in this case was tantamount to "anarchy." *Ante*, at 375. Quite to the contrary, the Court of Appeals has only fulfilled its constitutional responsibility to apply the Court's precedents in light of reason and experience—something that this Court today has plainly failed to do.

DONOVAN, SECRETARY OF LABOR, ET AL. v. RICHLAND COUNTY ASSOCIATION FOR RETARDED CITIZENS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-255. Decided January 11, 1982

Held: Where appellants, pursuant to 28 U. S. C. § 1252, could have filed a direct appeal to this Court from the District Court's decision holding the Fair Labor Standards Act unconstitutional as applied to employees of appellee's mental health facility, but instead appealed to the Court of Appeals, the Court of Appeals' judgment must be vacated as the court lacked jurisdiction, and, in addition, the appeal from its decision must be dismissed.

Vacated and appeal dismissed.

PER CURIAM.

Appellee brought this action against officials of the United States Department of Labor seeking a declaratory judgment that the Fair Labor Standards Act does not apply to employees of the Sidney Group Home, a mental health facility operated by appellee. In the alternative, appellee sought a declaration that an application of the Act to the Home would be unconstitutional. The United States District Court for the District of Montana held that "[t]he Fair Labor Standards Act is unconstitutional as applied to the plaintiff Association in its operation of the Sidney Group Home." App. to Juris. Statement 26a. The federal officials appealed this decision to the Court of Appeals, which affirmed. *Id.*, at 1a. The Government has now filed an appeal from that decision of the Court of Appeals.

Pursuant to 28 U. S. C. § 1252, appellants could have filed a direct appeal to this Court from the decision of the District Court.[1] This right to pursue a direct appeal to this Court

[1] "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . hold-

also served to deprive the Court of Appeals of jurisdiction, however, for 28 U. S. C. § 1291 provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." Since the Court of Appeals lacked jurisdiction in this case, its judgment and opinion must be vacated.[2]

In addition, the appeal filed from the decision of the Court of Appeals must be dismissed. Appellants' proper course of conduct was to file a direct appeal from the decision of the District Court. At this time, however, such relief is foreclosed by 28 U. S. C. § 2101(a).

We decline appellants' request that we remand this matter to the District Court for entry of a fresh decree from which a timely appeal might be taken. Although the complexities of litigation involving three-judge district courts made it appropriate to relieve certain appellants from the consequences of a misapplication of that somewhat arcane jurisprudence, as the cases cited in JUSTICE POWELL's separate opinion demonstrate, that rationale has no application to appellants' simple

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ing an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." 28 U. S. C. § 1252.

[2]The Court of Appeals actually entered two separate decisions in this case. In the judgment sought to be reviewed, the court affirmed the decision of the District Court holding the Fair Labor Standards Act unconstitutional as applied to the Sidney Group Home. After appellants had filed their notice of appeal in this case—and indeed after appellants had filed their jurisdictional statement in this Court—the Court of Appeals *sua sponte* recalled its earlier opinion and entered a new judgment *reversing* the District Court. *Richland County Assn.* v. *Marshall*, 660 F. 2d 388 (1981). The filing of the notice of appeal clearly divested the Court of Appeals of any jurisdiction that it otherwise had to decide the merits of this case.

failure in this case to follow the clear commands of 28 U. S. C. § 1252 and 28 U. S. C. § 1291.[3]

Judgment vacated and appeal dismissed.

JUSTICE POWELL, with whom JUSTICE BLACKMUN joins, concurring in part and dissenting in part.

I concur in the Court's decision to vacate the judgment and opinion of the Court of Appeals. But I would not simply dismiss the Government's appeal. Rather I would remand the matter to the District Court for entry of a fresh decree from which a timely appeal might be taken. This is the course

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[3] On the basis of the decision in *McLucas* v. *DeChamplain*, 421 U. S. 21 (1975), appellants contend that any defect in the jurisdiction of the Court of Appeals does not deprive this Court of jurisdiction under 28 U. S. C. § 1252. Appellants' reliance on *McLucas*, however, is misplaced. In that case, the Court held that it had jurisdiction under § 1252 to consider a direct appeal taken from a decision of a district court, even though the district court lacked jurisdiction because a three-judge district court should have been convened. The Court noted that the purpose of § 1252 was "to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality." 421 U. S., at 31. To effectuate this statutory purpose, the Court held that immediate review was available; it was not necessary to vacate the decision of the district court and remand the case for further proceedings by a three-judge court.

In contrast, appellants do not contend that the District Court in the instant case lacked jurisdiction over this controversy. Rather than pursue their right to immediate review in this Court, however, appellants obtained an intermediate decision from a Court of Appeals that had no power to consider this case. In so doing, they failed to pursue timely the right to immediate review conferred by § 1252. The fact that the Court of Appeals also held that the Act was unconstitutional does not resurrect the right created by § 1252 that had lapsed by appellants' action. This case is the antithesis of *McLucas;* a recognition of jurisdiction would permit needless delay in securing Supreme Court review of a decision holding a federal statute unconstitutional. We cannot believe that Congress intended § 1252 to serve such a function.

customarily followed by the Court in cases such as this. See *Query* v. *United States*, 316 U. S. 486 (1942); see also *Gonzalez* v. *Employees Credit Union*, 419 U. S. 90 (1974); *United States* v. *Christian Echoes Ministry*, 404 U. S. 561 (1972); *Board of Regents of University of Texas System* v. *New Left Education Project*, 404 U. S. 541 (1972); *Mitchell* v. *Donovan*, 398 U. S. 427 (1970); *Moody* v. *Flowers*, 387 U. S. 97 (1967). Title 28 U. S. C. § 1252 is designed to expedite review by this Court, not defeat it. Because review in this case has been unnecessarily delayed, the Court reasons that "a recognition of jurisdiction would permit needless delay in securing Supreme Court review of a decision holding a federal statute unconstitutional." *Ante*, at 391, n. 3. But just because this case already has been delayed too long does not require that we should compound the error by leaving the case in a posture defeating all review.

An Act of Congress has been held unconstitutional. I cannot believe that Congress intended § 1252 to serve the function of blocking review in this Court in these circumstances. Because the Court's disposition defeats the fundamental purpose of § 1252, I dissent.

Syllabus

BLANDING ET AL. *v.* DUBOSE ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

No. 81-325. Decided January 11, 1982

Section 5 of the Voting Rights Act requires a political subdivision that enacts a voting procedure different from that in effect on November 1, 1964, either to seek a declaratory judgment in the United States District Court for the District of Columbia approving the procedure or to submit the procedure to the Attorney General for preclearance. In 1976, the County Council of Sumter County, S. C., adopted a council-administrator form of government with at-large elections. When this governmental structure was submitted to the Attorney General for preclearance, he made a timely objection to the at-large method of election, and subsequently, when the county asked him to reconsider, refused to withdraw his objection. Private parties and the United States then brought separate suits in Federal District Court to prevent at-large elections, and, after the suits were consolidated, the District Court permanently enjoined County Council elections until the Voting Rights Act's requirements were fulfilled. In 1978, a county referendum approved at-large elections. In 1979, the county wrote a letter to the Attorney General advising him of the referendum results, but, referring to the letter as a "request for reconsideration," he still refused to withdraw his objection to at-large elections. Thereafter, defendant-appellees moved the District Court for summary judgment, contending that the 1979 letter was a preclearance submission, not a request for reconsideration, and that the Attorney General had not interposed an objection to the preclearance submission within the required time period. The District Court agreed.

Held: The 1979 letter was a reconsideration request, not a preclearance submission. Because the 1978 referendum did no more than endorse an election method that previously had been submitted to the Attorney General and that was the subject of an outstanding objection, the letter did not amount to a new preclearance submission. It was nothing more than a request that the Attorney General reconsider his earlier objection in light of the referendum results.

509 F. Supp. 1334, reversed.

PER CURIAM.

Appellants, citizens of Sumter County, S. C., have taken an appeal from a summary judgment entered against them on February 17, 1981, by the United States District Court for the District of South Carolina. The three-judge District Court concluded that Sumter County in June 1979 had made a preclearance submission under § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c, when it wrote the United States Attorney General informing him that a referendum had approved at-large County Council elections. Because the Attorney General failed to object within 60 days to the claimed preclearance submission, the District Court permitted Sumter County to proceed with at-large elections for its County Council. We hold that the county's June 1979 letter was a reconsideration request, not a preclearance submission, and reverse.

I

Section 5 of the Voting Rights Act[1] provides that when a covered political subdivision enacts a voting procedure different from that in effect on November 1, 1964, the political subdivision must either seek a declaratory judgment in the United States District Court for the District of Columbia approving the procedure or submit it to the United States Attorney General for preclearance. If the procedure is submitted to the Attorney General and he does not interpose an objection to the preclearance submission within 60 days, the procedure may be enforced.

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[1] Section 5, as amended, reads in pertinent part as follows:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State

On November 1, 1964, Sumter County was governed by its South Carolina General Assembly delegation acting through a County Board of Supervisors. In 1967, the General Assembly enacted a local bill that established a new form of government for Sumter County, namely, a seven-member County Commission elected at-large. See 1967 S. C. Acts, No. 371. Although this change required preclearance under § 5 of the Voting Rights Act, no steps were taken to obtain preclearance and at-large elections were held in 1968, 1970, 1972, and 1974.

In 1975, the General Assembly passed, and the Governor approved, the State's Home Rule Act, 1975 S. C. Acts, No. 283, codified as S. C. Code § 4–9–10 *et seq.* (1976 and Supp. 1980). The Act permitted a South Carolina county to hold a referendum to select a form of local government and to choose between at-large and single-member district elections. § 4–9–10. The Act specifically provided that if Sumter County did not hold a referendum, it would be assigned, effective July 1, 1976, the council-administrator form of government with council members elected at-large. § 4–9–10(b).

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or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, . . . and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission. . . . Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court."

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The Home Rule Act was submitted to the Attorney General of the United States for preclearance. The Attorney General[2] did not interpose an objection to the Act, as such, but he indicated that the outcomes of Home Rule Act referenda or assignments of forms of government under the Act would be subject to preclearance.

Sumter County chose not to hold a referendum. Accordingly, it was assigned the council-administrator form of government with at-large elections. The County Council passed a resolution and ordinance adopting that form of government and method of election.

On August 13, 1976, the County Administrator submitted the Sumter County Home Rule Ordinance and the 1967 Act to the Attorney General for preclearance. On December 3, after having obtained necessary additional information, see 28 CFR § 51.18 (1980), the Attorney General made a timely objection to the at-large method of election of the Council. He interposed no objection to the council-administrator form of government.

The county requested the Attorney General to reconsider his objection to at-large elections, see § 51.21(b), and the county and the Attorney General continued to correspond during 1977 and 1978. In early 1978, the county asked whether the Attorney General would withdraw his objection if a county referendum endorsed the at-large method of election. On April 28 of that year, the Attorney General declined to withdraw the objection and advised the county that a favorable referendum result, by itself, would not cause him to change his mind.

A Council election was scheduled for June 13, 1978. After the Attorney General refused to withdraw his objection, private parties and the United States brought separate federal suits to prevent elections under the at-large system. The

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[2]The Attorney General acted through the Assistant Attorney General, Civil Rights Division.

two suits were consolidated. A single judge issued a temporary restraining order, and on June 21, 1978, a three-judge District Court permanently enjoined County Council elections until the requirements of the Voting Rights Act were fulfilled.

In November 1978, Sumter County went ahead with its referendum in which voters were asked whether they preferred that Council members be elected at-large or from single-member districts. The majority endorsed the at-large method. Because Council members already were being elected under the at-large system, the county did not enact any resolution or ordinance to adopt the results of the referendum.

Then came the critical exchange of correspondence. On June 4, 1979, the Attorney General received a letter, dated June 1, from the county advising him of the referendum results. The letter expressed doubt as to whether it was a new preclearance submission of the at-large method, see 28 CFR § 51.2(c) (1980), or a request that the Attorney General reconsider his earlier objection to at-large elections, see § 51.21.[3] Subsequently, on July 23, a conference was held in Washington, D. C., between county officials and representatives of the Department of Justice. See § 51.23. Fifteen days later, see § 51.24,[4] on August 7, the Attorney General,

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[3] The letter states: "We are uncertain as to whether this submission should be termed a 'new submission,' or a 'request' for reconsideration of the Attorney General's objection to the County's original submission." 1 Record, Defendants' Exhibit 7, p. 3, attached to County Defendants' Motion for Summary Judgment filed with the District Court on Jan. 25, 1980.

[4] Section 51.24 reads:

"An objection shall be withdrawn if the submitting authority can produce information not previously available to it which satisfies the Attorney General that the change does not have a racially discriminatory purpose or effect. The Attorney General shall notify the submitting authority within 60 days of the request for reconsideration (provided that the Attorney General shall have at least 15 days following any conference that is held in which to decide) of his decision to continue or withdraw an objection, giving

referring to the county's letter as a "request for reconsideration," refused to withdraw the objection to at-large elections, but advised the county that the Department of Justice had not yet completed its review. On September 27, the Attorney General for a second time refused to withdraw his objection. See § 51.25.[5]

Thereafter, the defendant-appellees moved the District Court for summary judgment. They contended that the June letter was a preclearance submission, not a request for reconsideration. Section 5, the appellees noted, requires the Attorney General to object within 60 days of a preclearance submission. They asserted that, since the Attorney General did not interpose an objection by August 3, the county was free under § 5 to proceed with at-large elections.

A three-judge District Court was again convened. It agreed with appellees. 509 F. Supp. 1334 (1981). Referring to § 5 of the Voting Rights Act, the court observed that the 1978 referendum approved a method of electing county officials different from that in effect on November 1, 1964. The letter received June 4, 1979, according to the District Court, was the required preclearance submission. Rejecting the Attorney General's argument that the letter was a request for reconsideration of his timely 1976 objection to at-large elections, the District Court declared: "This Court will not be a party to the [Attorney General's] effort to excuse his

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the reasons for his decision. A copy of the notification shall be sent to any party that has commented on the submission or has requested notice of the Attorney General's action thereon."

[5]The District Court in its opinion, 509 F. Supp. 1334 (1981), omitted mention of the August 7 letter, which is Defendants' Exhibit 8 attached to the motion for summary judgment. The court stated that the Attorney General did not take action following the July 23 conference until he refused to withdraw his objection on September 27. 509 F. Supp., at 1336. In this respect, the decision of the District Court was clearly erroneous.

failure to act by mislabeling a submission for preclearance as a 'request for reconsideration.'"[6] 509 F. Supp., at 1336.

II

We conclude that the District Court, not the Attorney General, mislabeled the June 1979 letter. The court ruled that that letter was a preclearance submission because the referendum approved a method of selecting officials different from that in effect on November 1, 1964. But the change to at-large County Council elections already had been submitted to the Attorney General for preclearance. The 1978 referendum merely approved the pre-existing at-large method—the very method to which the Attorney General earlier had made a timely objection. Because the referendum did no more than endorse a method of election that previously had been submitted to the Attorney General and that was the subject of an outstanding objection, the June letter did not amount to a new preclearance submission.

Indeed, the June letter fell squarely within the definition of a reconsideration request. The applicable regulation provides that the Attorney General will reconsider his objection upon a request by a submitting authority "to present further substantiating or explanatory information which was not previously available to the submitting authority." 28 CFR § 51.21(b) (1980). The results of the referendum constituted further explanatory information concerning at-large elections which the county asked the Attorney General to consider.

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[6] Once it concluded that the June letter was a preclearance submission, the District Court found that the Attorney General's actions were untimely. But it can hardly be said that the Attorney General failed to act in response to the June letter. We note again that Department of Justice officials held a conference with Sumter County officials on July 23, that the Attorney General refused to withdraw his objection on August 7, within 15 days of that conference, and that the Attorney General once more, on September 27, refused to withdraw his objection.

The June letter thus was nothing more than a request that the Attorney General reconsider his earlier objection to at-large County Council elections in light of the referendum results.

The District Court put forward several reasons why, in its view, the June letter was not a reconsideration request. None of them persuades us. First, the District Court pointed out that the county already had made one reconsideration request. But the regulations do not limit a political subdivision to a single request for reconsideration. Second, the court relied upon 28 CFR § 51.21(b) (1980), which requires that a reconsideration request be made within 10 days of the Attorney General's objection. The Attorney General, however, follows the laudable practice of accepting reconsideration requests even though they are untimely, thus considering possibly important information that was not available within 10 days of the original objection. See also § 51.25 (permitting the Attorney General to reconsider his objection on his own motion). In any event, the mere fact that a reconsideration request is untimely does not convert it into a preclearance submission. Third, the court also cited § 51.21(b) for the proposition that a reconsideration request must be based on information not previously available. That requirement poses no obstacle to considering the June letter a reconsideration request, because the outcome of the referendum constituted information not previously available to Sumter County authorities. And, just as a reconsideration request does not become a preclearance submission merely by being untimely, so a reconsideration request does not become a preclearance submission simply by being repetitive.

Not only does the District Court decision mischaracterize the June letter, but its decision also has undesirable results. Under that court's ruling, a political subdivision could recommence the 60-day period at will by readopting the contested voting procedure. In addition, the Attorney General would be forced to interpose redundant objections to the same

change in voting laws. For these reasons also, we refuse to accept the District Court's interpretation of § 5.

Finally, we have frequently stated that courts should grant deference to the interpretation given statutes and regulations by the officials charged with their administration. See, *e. g.*, *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555 (1980); *United States* v. *Sheffield Board of Comm'rs*, 435 U. S. 110, 131 (1978); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). In this case, the Attorney General employed reasonable definitions of a preclearance submission and of a reconsideration request when he treated the June letter as in the latter category. Indeed, the Attorney General followed the more sensible course.[7]

The judgment of the District Court is

Reversed.

THE CHIEF JUSTICE concurs in the judgment.

JUSTICE REHNQUIST, with whom JUSTICE POWELL joins, concurring.

The *per curiam* correctly concludes that the June 1, 1979, letter from Sumter County was a request for reconsideration, not a preclearance submission. Therefore, I concur in the *per curiam*'s reasoning and conclusion. I concur reluctantly, however, for the record in this case illustrates what I view as the unreasonably burdensome and unrealistic control which the Federal Government routinely exercises over state and local governments under the Voting Rights Act.

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[7] Before the District Court, there was a dispute whether the June letter was accompanied by a multipage document supplying, *inter alia*, the information required by 28 CFR § 51.10 (1980), or whether that document was first presented to the Department of Justice at the July 23 conference. If the document was not presented until July 23, the Attorney General's August 7 letter might not have been untimely even if the June letter were a preclearance submission. See §§ 51.3(b) and 51.18(a). See also *City of Rome* v. *United States*, 446 U. S. 156, 171 (1980). Because we hold that the June letter was not a preclearance submission, we need not address this issue.

The record recounts a 5-year effort by Sumter County to obtain the approval of several United States Assistant Attorneys General for an election method adopted by the South Carolina General Assembly. This effort included occasional correspondence with high-level attorneys in the Civil Rights Division of the Department of Justice, and, apparently, more frequent contact with low-level attorneys who requested information about plans, statistics, histories, names, places, and related facts. Although such communications are not unusual in dealings with today's federal bureaucracy, the record portrays a particularly frustrating effort to please a distant authority with veto power over the decisions of local officials. For example, an October 31, 1977, letter from appellees to an Assistant Attorney General explains the county's legal inability under state law to comply with various "suggestions" from the Department of Justice. The letter concludes:

> "This leaves us in a dilemma. The [County] Council doesn't wish to be in the position of seeming to pay no attention to your suggestion that the form of election should properly be changed; or to seem to be disregarding your suggestions. On the other hand, the County's Council is advised that it has inadequate legal power to act under South Carolina law in the manner you seem to be suggesting. . . . Perhaps you can suggest something to us which would help us to resolve our difficulties which have us disturbed, perplexed, and confounded." 1 Record, Defendants' Exhibit 20, pp. 2–3, attached to County Defendants' Motion for Summary Judgment, filed Jan. 25, 1980.

Today's decision, of course, will only reopen the dispute and again place the county at the mercy of attorneys in the Justice Department. There seems to be something inherently unsatisfactory about a system which places such discretion-

ary authority in the hands of a few unelected federal officials who are wholly detached from the realities of the locality and the preferences of the local electorate. Nonetheless, it is the system which Congress has established, and I therefore concur in the judgment.

CHARLES D. BONANNO LINEN SERVICE, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 80–931. Argued October 13, 1981—Decided January 12, 1982

Petitioner linen supply company was a member of an association formed to negotiate collective-bargaining agreements with respondent truckdrivers' union as a multiemployer unit. When the association and union reached an impasse in bargaining for a proposed agreement, the union initiated a selective strike against petitioner, most of the other members of the association locked out their drivers, and petitioner hired permanent replacements for its striking drivers. Thereafter, petitioner notified the association and the union that it was withdrawing from the association, and refused to sign a collective-bargaining agreement later executed by the union and the association. Meanwhile, the union filed the present action, alleging that petitioner's purported withdrawal from the bargaining unit constituted an unfair labor practice. The National Labor Relations Board (Board) affirmed the Administrative Law Judge's finding that no unusual circumstances excused such withdrawal, and ordered petitioner to sign and implement retroactively the agreement concluded between the union and the employers' association, the refusal to sign such agreement constituting an unfair labor practice in violation of §§ 8(a)(5) and (1) of the National Labor Relations Act (NLRA). The Court of Appeals enforced the Board's order.

Held: The bargaining impasse did not justify petitioner's unilateral withdrawal from the multiemployer bargaining unit. Pp. 408–419.

(a) An impasse is not sufficiently destructive of group bargaining to justify such a withdrawal but is only a temporary deadlock or hiatus in negotiations. Permitting a withdrawal at impasse would as a practical matter undermine the utility of multiemployer bargaining. While no interim or separate agreements were executed in this case, the impasse did not initiate any right to execute an agreement inconsistent with the duty to abide by the results of group bargaining. The balance the Board has struck is not inconsistent with the terms or purposes of the NLRA. Pp. 412–417.

(b) Here, the Board has developed a rule which although it may deny an employer a particular economic weapon, does so in the interest of the proper and pre-eminent goal of maintaining the stability of the multiemployer bargaining unit. Pp. 417–419.

630 F. 2d 25, affirmed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 419. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 420. O'CONNOR, J., filed a dissenting opinion, in which POWELL, J., joined, *post*, p. 427.

Sidney A. Coven argued the cause and filed a brief for petitioner.

Norton J. Come argued the cause for respondent National Labor Relations Board. With him on the brief were *Acting Solicitor General Wallace*, *Harriet S. Shapiro*, *Linda Sher*, and *John H. Ferguson*. *James T. Grady* argued the cause and filed a brief for respondent Teamsters Local Union No. 25.*

JUSTICE WHITE delivered the opinion of the Court.

The issue here is whether a bargaining impasse justifies an employer's unilateral withdrawal from a multiemployer bargaining unit. The National Labor Relations Board (Board) concluded that an employer attempting such a withdrawal commits an unfair labor practice in violation of §§ 8(a)(5) and 8(a)(1) of the National Labor Relations Act (Act), 29 U. S. C. §§ 158(a)(5) and 158(a)(1), by refusing to execute the collective-bargaining agreement later executed by the union and the multiemployer association.[1] The Court of Appeals for the First Circuit enforced the Board's order. 630 F. 2d 25

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* *Lawrence T. Zimmerman* and *Steven R. Semler* filed a brief for Graphic Arts Union Employers of America as *amicus curiae* urging reversal.

Briefs of *amici curiae* were filed by *Ralph B. Hoyt* for Golden Bear Motors, Inc.; and by *Harrison Combs* for United Mine Workers of America.

[1] Section 8(d) of the Act, 61 Stat. 142, 29 U. S. C. § 158(d), states, in relevant part:

"[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, . . . and the execution of a written contract incorporating any agreement

(1980). Both the Board and the Court of Appeals recognized that several other Courts of Appeals had previously rejected the Board's position on this issue.[2] We granted certiorari, 450 U. S. 979 (1981), to resolve the conflict among the Circuits on this important question of federal labor law. We affirm the judgment of the Court of Appeals.

I

The factual findings of the Administrative Law Judge were affirmed by the Board and are undisputed. Petitioner, Charles D. Bonanno Linen Service, Inc. (Bonanno), is a Massachusetts corporation engaged in laundering, renting, and distributing linens and uniforms. Teamsters Local No. 25 (Union) represents its drivers and helpers as well as those of other linen supply companies in the area. For several

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reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

Section 8(a)(5) of the Act, 61 Stat. 141, 29 U. S. C. § 158(a)(5), declares it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 8(b)(3), 61 Stat. 141, 29 U. S. C. § 158(b)(3), declares it an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)." Section 9(a), 61 Stat. 143, 29 U. S. C. § 159(a), in turn, specifies that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ." Finally under § 2(2), 61 Stat. 137, 29 U. S. C. § 152(2), the term "employer" includes "any person acting as an agent of an employer, directly or indirectly," and the term "person" is defined in § 2(1), 61 Stat. 137, 29 U. S. C. § 152(1), to include "associations."

[2] See *NLRB* v. *Independent Assn. of Steel Fabricators, Inc.*, 582 F. 2d 135 (CA2 1978), cert. denied, 439 U. S. 1130 (1979); *NLRB* v. *Beck Engraving Co., Inc.*, 522 F. 2d 475 (CA3 1975); *NLRB* v. *Associated Shower Door Co., Inc.*, 512 F. 2d 230 (CA9), cert. denied, 423 U. S. 893 (1975); *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F. 2d 181 (CA5 1974); *Fairmont Foods Co.* v. *NLRB*, 471 F. 2d 1170 (CA8 1972).

years, Bonanno has been a member of the New England Linen Supply Association (Association), a group of 10 employers formed to negotiate with the Union as a multiemployer unit and a signatory of the contracts negotiated between the Union and the Association. On February 19, 1975, Bonanno authorized the Association's negotiating committee to represent it in the anticipated negotiations for a new contract. Bonanno's president became a member of the committee.

The Union and the Association held 10 bargaining sessions during March and April. On April 30, the negotiators agreed upon a proposed contract, but four days later the Union members rejected it. By May 15, according to the stipulations of the parties, the Union and the Association had reached an impasse over the method of compensation: the Union demanded that the drivers be paid on commission, while the Association insisted on continuing payment at an hourly rate.

Several subsequent meetings failed to break the impasse. On June 23, the Union initiated a selective strike against Bonanno. In response, most of Association members locked out their drivers. Despite sporadic meetings, the stalemate continued throughout the summer. During this period two of the employers met secretly with the Union, presumably in an effort to reach a separate settlement. These meetings, however, never reached the level of negotiations.

Bonanno hired permanent replacements for all of its striking drivers. On November 21, it notified the Assocation by letter that it was "withdrawing from the Association with specific respect to negotiations at this time because of an ongoing impasse with Teamsters Local 25." Pet. for Cert. 58. Bonanno mailed a copy of its revocation letter to the Union and read the letter over the phone to a Union representative.

Soon after Bonanno's putative withdrawal, the Association ended the lockout. It told the Union that it wished to continue multiemployer negotiations. Several negotiating ses-

sions took place between December and April, without Bonanno participating. In the middle of April, the Union abandoned its demand for payment on commission and accepted the Association's offer of a revised hourly wage rate. With this development, the parties quickly agreed on a new contract, dated April 23, 1976, and given retroactive effect to April 18, 1975.

Meanwhile, on April 9, 1976, the Union had filed the present action, alleging that Bonanno's purported withdrawal from the bargaining unit constituted an unfair labor practice. In a letter dated April 29, the Union informed Bonanno that because the Union had never consented to the withdrawal, it considered Bonanno to be bound by the settlement just reached. In a reply letter, Bonanno denied that it was bound by the contract.

An Administrative Law Judge concluded, after a hearing, that no unusual circumstances excused Bonanno's withdrawal from the multiemployer bargaining unit. The Board affirmed, ordering Bonanno to sign and implement the contract retroactively. In a supplemental decision, the Board explained the basis of its decision that Bonanno's attempt to withdraw from the multiemployer unit was untimely and ineffective. *Charles D. Bonanno Linen Service, Inc.*, 243 N. L. R. B. 1093 (1979). The Court of Appeals enforced the Board's order. 630 F. 2d 25 (1980).

II

The standard for judicial review of the Board's decision in this case was established by *NLRB* v. *Truck Drivers*, 353 U. S. 87 (1957) *(Buffalo Linen)*. There, the Union struck a single employer during negotiations with a multiemployer bargaining association. The other employers responded with a lockout. Negotiations continued, and an agreement was reached. The Union, claiming that the lockout violated its rights under §§ 7 and 8 of the Act, then filed charges with the Board. The Board rejected the claim, but the Court of Appeals held that the lockout was an unfair practice.

This Court in turn reversed. That the Act did not expressly authorize or deal with multiemployer units or with lockouts in that context was recognized. Nonetheless, multiemployer bargaining had "long antedated the Wagner Act" and had become more common as employers, in the course of complying with their duty to bargain under the Act, "sought through group bargaining to match increased union strength." 353 U. S., at 94–95 (footnote omitted). Furthermore, at the time of the debates on the Taft-Hartley amendments, Congress had rejected a proposal to limit or outlaw multiemployer bargaining. The debates and their results offered "cogent evidence that in many industries multiemployer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Id.*, at 95.[3] Congress' refusal to intervene indicated that it intended to leave to the Board's specialized judgment the resolution of conflicts between union and employer rights that were bound to arise in multiemployer bargaining. In such situations, the Court said:

> "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that bal-

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[3] As the Court of Appeals explained in this case:

"Multiemployer bargaining offers advantages to both management and labor. It enables smaller employers to bargain 'on an equal basis with a large union' and avoid 'the competitive disadvantages resulting from nonuniform contractual terms.' *NLRB* v. *Truck Drivers Local 449*, 353 U. S. 87, 96 . . . (1957). At the same time, it facilitates the development of industry-wide, worker benefit programs that employers otherwise might be unable to provide. More generally, multiemployer bargaining encourages both sides to adopt a flexible attitude during negotiations; as the Board explains, employers can make concessions 'without fear that other employers will refuse to make similar concessions to achieve a competitive advantage,' and a union can act similarly 'without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers.' *Brief*, at 10. Finally, by permitting the union

> ance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Id.*, at 96.

Thus, the Court of Appeals' rejection of the Board's justification of the lockout as an acceptable effort to maintain the integrity of the multiemployer unit and its refusal to accept the lockout as a legitimate response to the whipsaw strike had too narrowly confined the exercise of the Board's discretion. *Id.*, at 97.

Multiemployer bargaining has continued to be the preferred bargaining mechanism in many industries,[4] and as *Buffalo Linen* predicted, it has raised a variety of problems requiring resolution. One critical question concerns the rights of the union and the employers to terminate the multiemployer bargaining arrangement. Until 1958, the Board permitted both employers and the union to abandon the unit even in the midst of bargaining. *Bearing & Rim Supply Co.*, 107 N. L. R. B. 101, 102–103 (1953); *Stamford Wall Paper*, 92 N. L. R. B. 1173 (1951); *Morand Bros. Beverage Co.*, 91 N. L. R. B. 409, 413, 416–418 (1950), enf'd in part on other grounds, 190 F. 2d 576, 581–582 (CA7 1951). But in *Retail Associates, Inc.*, 120 N. L. R. B. 388 (1958), the Board announced guidelines for withdrawal from multiemployer units. These rules, which reflect an increasing emphasis on the stability of multiemployer units, permit any party to withdraw

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and employers to concentrate their bargaining resources on the negotiation of a single contract, multiemployer bargaining enhances the efficiency and effectiveness of the collective bargaining process and thereby reduces industrial strife." 630 F. 2d, at 28.

[4] A recent survey of major collective-bargaining agreements (those covering 1,000 or more employees) found that of 1,536 major agreements, 648 (42%) were multiemployer agreements and that 3,238,400 employees were covered by these agreements. U. S. Bureau of Labor Statistics, Dept. of Labor, Bull. No. 2065, Characteristics of Major Collective Bargaining Agreements—January 1, 1978, p. 12, table 1.8 (1980).

prior to the date set for negotiation of a new contract or the date on which negotiations actually begin, provided that adequate notice is given. Once negotiations for a new contract have commenced, however, withdrawal is permitted only if there is "mutual consent" or "unusual circumstances" exist. *Id.*, at 395.

The Board's approach in *Retail Associates* has been accepted in the courts,[5] as have its decisions that unusual circumstances will be found where an employer is subject to extreme financial pressures or where a bargaining unit has become substantially fragmented.[6] But as yet there is no consensus as to whether an impasse in bargaining in a multiemployer unit is an unusual circumstance justifying unilateral withdrawal by the Union or by an employer. After equivocating for a time, the Board squarely held that an impasse is not such an unusual circumstance. *Hi-Way Billboards, Inc.*, 206 N. L. R. B. 22 (1973). The Court of Appeals for the Fifth Circuit refused enforcement of that decision, 500 F. 2d 181 (1974), although it has since modified its views and now supports the Board.[7] Similar decisions by the Board were also overturned by the Courts of Appeals in three other Cir-

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[5] See, *e. g.*, *NLRB* v. *Custom Wood Specialties, Inc.*, 622 F. 2d 381 (CA8 1980); *Carvel Co.* v. *NLRB*, 560 F. 2d 1030 (CA1 1977), cert. denied, 434 U. S. 1065 (1978); *NLRB* v. *Central Plumbing Co.*, 492 F. 2d 1252 (CA6 1974); *NLRB* v. *Brotherhood of Teamsters, Local No. 70*, 470 F. 2d 509 (CA9 1972), cert. denied, 414 U. S. 821 (1973); *NLRB* v. *Johnson Sheet Metal, Inc.*, 442 F. 2d 1056 (CA10 1971); *NLRB* v. *Dover Tavern Owners' Assn.*, 412 F. 2d 725 (CA3 1969); *NLRB* v. *John J. Corbett Press, Inc.*, 401 F. 2d 673 (CA2 1968).

[6] See, *e. g.*, *NLRB* v. *Southwestern Colorado Contractors Assn.*, 447 F. 2d 968 (CA10 1971); *NLRB* v. *Spun-Jee Corp.*, 385 F. 2d 379 (CA2 1967); *Connell Typesetting Co.*, 212 N. L. R. B. 918 (1974); *Atlas Electrical Service Co.*, 176 N. L. R. B. 827 (1969); *U. S. Lingerie Corp.*, 170 N. L. R. B. 750 (1968).

[7] In *NLRB* v. *Marine Machine Works, Inc.*, 635 F. 2d 522 (CA5 1981), it was concluded that the Board's policy wisely and properly weighed the competing policy concerns.

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cuits. *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475 (CA3 1975); *NLRB* v. *Independent Assn. of Steel Fabricators*, 582 F. 2d 135 (CA2 1978); *H. & D., Inc.* v. *NLRB*, 665 F. 2d 257, 105 LRRM 3070 (CA9 1980), cert. pending, No. 80–1498. After again considering the question in this case, the Board issued its decision reaffirming its position that an impasse is not an unusual circumstance justifying withdrawal. Its decision was sustained and enforced by the Court of Appeals for the First Circuit.

III

We agree with the Board and with the Court of Appeals. The Board has recognized the voluntary nature of multiemployer bargaining. It neither forces employers into multiemployer units nor erects barriers to withdrawal prior to bargaining. At the same time, it has sought to further the utility of multiemployer bargaining as an instrument of labor peace by limiting the circumstances under which any party may unilaterally withdraw during negotiations. Thus, it has reiterated the view expressed in *Hi-Way Billboards* that an impasse is not sufficiently destructive of group bargaining to justify unilateral withdrawal. As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force." 243 N. L. R. B., at 1093–1094. Furthermore, an impasse may be "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process." *Id.*, at 1094. Hence, "there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways." *Ibid.* As the Board sees it, permitting withdrawal at impasse would as a practical matter undermine the utility of multiemployer bargaining.[8]

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[8]The Board explains that if withdrawal were permitted at impasse, the parties would bargain under the threat of withdrawal by any party who

Of course, the ground rules for multiemployer bargaining have not come into being overnight. They have evolved and are still evolving, as the Board, employing its expertise in the light of experience, has sought to balance the "conflicting legitimate interests" in pursuit of the "national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen*, 353 U. S., at 95, 96. The Board might have struck a different balance from the one it has, and it may be that some or all of us would prefer that it had done so. But assessing the significance of impasse and the dynamics of collective bargaining is precisely the kind of judgment that *Buffalo Linen* ruled should be left to the Board. We cannot say that the Board's current resolution of the issue is arbitrary or contrary to law.

If the Board's refusal to accept an impasse, standing alone, as an unusual circumstance warranting withdrawal were the only issue in this case, we would affirm without more. But several Courts of Appeals have rejected *Hi-Way Billboards* on the grounds that impasse may precipitate a strike against one or all members of the unit and that upon impasse the Board permits the union to execute interim agreements with individual employers. These Courts of Appeals consider the possibility of such events as sufficient grounds for any employer in the unit to withdraw.

In *Beck Engraving Co.*, for example, the Court of Appeals for the Third Circuit held that an impasse followed by a selective strike justified unilateral withdrawal from the bargaining unit. Because at that juncture labor relations law, as interpreted by the Board, would permit the union to execute

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was not completely satisfied with the results of the negotiations. That is, parties could precipitate an impasse in order to escape any agreement less favorable than the one expected. In addition, it is precisely at and during impasse, when bargaining is temporarily replaced by economic warfare, that the need for a stable, predictable bargaining unit becomes acute in order that the parties can weigh the costs and possible benefits of their conduct. Brief for Respondent NLRB 24–25.

an interim agreement with the struck employer, the Court of Appeals concluded that the union and the employer entering into such an agreement would be given unfair advantage against other employers if the latter were not permitted to withdraw from the unit. The Court of Appeals thought the employer's right to withdraw and the union's privilege of executing interim contracts should mature simultaneously. It concluded that the Board's approach too drastically upset the bargaining equilibrium to be justified in the name of maintaining the stability of the bargaining unit.

The Board's reasons for adhering to its *Hi-Way Billboards* position are telling. They are surely adequate to survive judicial review. First, it is said that strikes and interim agreements often occur in the course of negotiations prior to impasse and that neither tactic is necessarily associated with impasse. Second, it is "vital" to understand that the Board distinguishes "between interim agreements which contemplate adherence to a final unitwide contract and are thus not antithetical to group bargaining and individual agreements which are clearly inconsistent with, and destructive of, group bargaining." 243 N. L. R. B., at 1096. In *Sangamo Construction Co.*, 188 N. L. R. B. 159 (1971), and *Plumbers and Steamfitters Union No. 323 (P. H. C. Mechanical Contractors)*, 191 N. L. R. B. 592 (1971), the agreements arrived at with the struck employers were only temporary: both the union and the employer executing the interim agreement were bound by any settlement resulting from multiemployer bargaining. "[I]n both cases, since the early signers maintained a vested interest in the outcome of final union-association negotiations, the multiemployer unit was neither fragmented nor significantly weakened," 243 N. L. R. B., at 1096, and unilateral withdrawal was not justified.

On the other hand, where the union, not content with interim agreements that expire with the execution of a unit-wide contract, executes separate agreements that will survive unit negotiations, the union has so "effectively frag-

mented and destroyed the integrity of the bargaining unit," *ibid.*, as to create an "unusual circumstance" under *Retail Associates* rules. Cf. *Typographic Service Co.*, 238 N. L. R. B. 1565 (1978). Furthermore, the Board has held that the execution of separate agreements that would permit either the union or the employer to escape the binding effect of an agreement resulting from group bargaining is a refusal to bargain and an unfair labor practice on the part of both the union and any employer executing such an agreement. *Teamsters Union Local No. 378 (Olympia Automobile Dealers Assn.)*, 243 N. L. R. B. 1086 (1979). The remaining members of the unit thus can insist that parties remain subject to unit negotiations in accordance with their original understanding.

The Board therefore emphatically rejects the proposition that the negotiation of truly interim, temporary agreements, as distinguished from separate, final contracts, is "inconsistent with the concept of multiemployer bargaining units." 243 N. L. R. B., at 1096. Although interim agreements establish terms and conditions of employment for one or more employer members of the unit pending the outcome of renewed group bargaining, all employers, including those executing interim agreements, have an "equivalent stake" in the final outcome because the "resulting group agreement would then apply to all employers, including each signer of an interim agreement." *Ibid.* Such interim arrangements "preclude a finding that the early signers had withdrawn from the unit." *Ibid.* Although the Board concedes that interim agreements exert economic pressure on struck employers, this fact should no more warrant withdrawal than the refusal of one employer to join with others in a lockout.[9] In any event, the Board's view is that interim agreements, on bal-

[9] The Board adopts the language of the First Circuit below: "the uneven application of economic pressure *per se* is not inconsistent with multiemployer bargaining." 630 F. 2d, at 33. In addition, it points out that

ance, tend to deter rather than promote unit fragmentation since they preserve a continuing mutual interest by all employer members in a final associationwide contract.

The Board also rests on this Court's admonition that the Board should balance "conflicting legitimate interests" rather than economic weapons and bargaining strength. Its conclusion is that the interest in unit stability, recognized as a major consideration by both *Buffalo Linen* and *NLRB* v. *Brown*, 380 U. S. 278 (1965), adequately justifies enforcement of the obligation to bargain despite the execution of a temporary agreement.

Of course, no interim or separate agreements were executed in this case. But neither did the impasse initiate any right to execute an agreement inconsistent with the duty to abide by the results of group bargaining. Some Courts of Appeals, taking a different view of the interests involved, question the legitimacy of enforcing the duty to bargain where impasse has occurred and interim agreements have been or may be executed. We think the Board has confined itself within the zone of discretion entrusted to it by Con-

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the employer also has additional weapons at its disposal for exerting economic pressure. It can engage in a lockout, make unilateral changes in working conditions if they are consistent with the offers the union has rejected, hire replacements to counter the loss of striking employees, and try to blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another. The Board further notes that interim agreements do not always have the effect the Union desires. The signing of an interim agreement may not weaken the association's determination to resist the union's demands, see *Plumbers & Steamfitters Union No. 323 (P. H. C. Mechanical Contractors)*, 191 N. L. R. B. 592 (1971), and the eventual contract settlement may have terms more favorable to the employers than the interim agreements, requiring the union to give up its temporary gains, see *Associated Shower Door Co.*, 205 N. L. R. B. 677 (1973), enf'd on other grounds, 512 F. 2d 230 (CA9), cert. denied, 423 U. S. 893 (1975). Brief for Respondent NLRB 33, nn. 48 and 49.

gress. The balance it has struck is not inconsistent with the terms or purposes of the Act, and its decision should therefore be enforced.

IV

THE CHIEF JUSTICE, in dissent, is quite right that this case turns in major part on the extent to which the courts should defer to the Board's judgment with respect to the critical factors involved. He is also correct in restating the Court's admonition in *Brown*, *supra*, at 291, that "[r]eviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." But THE CHIEF JUSTICE does not suggest that the Board seeks here to promote illegitimate ends. Both he and the Board strive to further labor peace through effective collective bargaining. Hence, if the Board's assessment of the impact of impasse and interim agreements on those goals is accepted, it is plain that its decision in this case is consistent with its mandate and promotes the underlying congressional purpose.

THE CHIEF JUSTICE, candidly accepting that the issue is one of balancing the legitimate interests involved, nonetheless disputes the Board's judgment regarding the underlying factors with respect to what would best serve the statutory goals. He rejects the Board's assessment of the significance of impasse and interim agreements in the multiemployer bargaining context and substitutes his own views. For example, he finds that the impasse in this case "was no 'temporary deadlock or hiatus in negotiations' as the Board claims; this was instead a complete breakdown in negotiations coupled with a prolonged strike and lock-out." *Post*, at 422.[10] He

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[10] The dissent here ignores *Buffalo Linen*'s recognition of whipsawing as a legitimate weapon of economic persuasion in the course of collective bargaining. See *Buffalo Linen*, 353 U. S., at 90, n. 7.

also states, contrary to the Board's judgment, that when the parties have remained at impasse for a long period, "withdrawal of one or a few employers may facilitate rather than frustrate bargaining." *Post*, at 424. Thus, THE CHIEF JUSTICE avers, it would be "more consistent with [the goals of industrial peace] to permit withdrawal and allow negotiation of separate agreements than to force the parties into escalated economic warfare." *Post*, at 425.

THE CHIEF JUSTICE may be quite right. There is obviously room for differing judgments, however, as the conflicting judgments of the Courts of Appeals and the strong views of the Board on the issues now before us make clear. But the dissenting Justices would have us substitute our judgment for those of the Board with respect to the issues that Congress intended the Board should resolve. This we are unwilling to do. If the courts are to monitor so closely the agency's assessment of the kind of factors involved in this case, the role of the judiciary in administering regulatory statutes will be enormously expanded and its work will become more complex and time consuming. We doubt that this is what Congress intended in subjecting the Board to judical review. Indeed, we so held in *Buffalo Linen*.

We agree that the National Labor Relations Act does not constitute the Board as an "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands," *NLRB* v. *Insurance Agents*, 361 U. S. 477, 497 (1960), or give "the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power," *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 317 (1965). But the Board has refused to enter that proscribed area, despite the urging of several Courts of Appeals. Instead, it looked at its statutory mandate and duty—to promote labor peace through strengthened collective bargaining—in developing its rule.

In *Brown* itself the Court disagreed with the Board and held that no unfair labor practice occurred when members of a multiemployer unit hired temporary replacements following a lockout. Maintaining the stability of the multiemployer unit was the key to that decision: the Court reasoned that without temporary replacements "the prospect that the whipsaw strike would succeed in breaking up the employer association was not at all fanciful." *Brown*, 380 U. S., at 284. In contrast to its action in *Brown*, the Board in this case has developed a rule which, although it may deny an employer a particular economic weapon, does so in the interest of the proper and pre-eminent goal, maintaining the stability of the multiemployer unit. Because the Board has carefully considered the effect of its rule on that goal, we should defer to its judgment.

Affirmed.

JUSTICE STEVENS, concurring.

The Court's holding today does not impair an employer's freedom to structure the manner in which it will conduct collective bargaining. Its opinion, which I join, recognizes the voluntary nature of multiemployer bargaining, see *ante*, at 412, and notes that the Board "neither forces employers into multiemployer units nor erects barriers to withdrawal prior to bargaining." *Ibid.*

The mere fact that an employer bargains in conjunction with other employers does not necessarily mean that it must sign any contract that is negotiated by the group. The Board requires that, to be bound by the terms of group negotiation, the members of an employer association must "have indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action," and the union representing their employees must "[have] been notified of the formation of the group and the delegation of bargaining authority to it, and [have] assented and entered upon negotiations with the group's representa-

tive." *Weyerhaeuser Co.*, 166 N. L. R. B. 299, 299 (1967), enf'd, 130 U. S. App. D. C. 176, 398 F. 2d 770 (1968). This test is well established in the Courts of Appeals. See, *e. g.*, *NLRB* v. *Beckham, Inc.*, 564 F. 2d 190, 192 (CA5 1977); *Komatz Construction, Inc.* v. *NLRB*, 458 F. 2d 317, 321 (CA8 1972); *NLRB* v. *Hart*, 453 F. 2d 215, 217 (CA9 1971), cert. denied, 409 U. S. 844 (1972); *NLRB* v. *Dover Tavern Owners' Assn.*, 412 F. 2d 725, 727 (CA3 1969). Absent such an unequivocal commitment to be bound by group action, an employer is free to withdraw from group negotiation at any time, or simply to reject the terms of the final group contract. See *Komatz Construction, supra; Ruan Transport Corp.*, 234 N. L. R. B. 241 (1978). In the instant case, petitioner has never questioned the unequivocal character of its commitment to participate in and to be bound by the results of group negotiation.

The Court's holding does not preclude an employer from explicitly conditioning its participation in group bargaining on any special terms of its own design. Presumably, an employer could refuse to participate in multiemployer bargaining unless the union accepted the employer's right to withdraw from the bargaining unit should an impasse develop. The union or the other members of the bargaining unit of course may reject such a condition; in such a case, however, the employer simply would be forced to choose between agreeing to be bound by the terms of group negotiation without a right of withdrawal at impasse, or forgoing the advantages of multiemployer bargaining and bargaining on its own.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

The Court today affirms the National Labor Relations Board's finding that withdrawal of an employer from a multiemployer bargaining unit, after a long drawn-out and unproductive bargaining impasse, constitutes an unfair labor practice by the employer in violation of §§ 8(a)(1) and (5) of the

National Labor Relations Act, 29 U. S. C. §§ 158(a)(1), (5). In addition, the Court indicates that withdrawal is not permissible even after the union has negotiated separate agreements with other members of the bargaining unit.[1] The Court bases its holding in large part on deference to the views of the Board. Although judicial review of the Board's balancing of conflicting interests is limited, "the balance struck by the Board is [not] immune from judicial examination and reversal in proper cases." *NLRB* v. *Brown*, 380 U. S. 278, 290–291 (1965). When the Board's decisions create an artifical and unwarranted imbalance of economic weapons, the courts are not bound to show abject deference to the Board's views. Today the Court perpetuates an unsupportable imbalance and in so doing damages the very multiemployer bargaining mechanism it seeks to protect—a mechanism of great value to both unions and employers.[2]

I

The Court holds that the occurrence of an impasse, without more, does not *automatically* trigger a right of an employer

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[1] "Whipsawing" describes any one of several tactics by which a union creates a situation in which some but not all employers in a multiemployer group are closed or hampered by a strike or lockout. A union may call a strike against one or a few of the employers or, in the face of a lockout, it may negotiate a separate agreement with one or a few employers. Some of the employers are thus unable to conduct business as usual while others are fully operational. The theory behind whipsawing is that the impaired employers, seeing their competitors enjoying a market advantage and fearing that those competitors will increase their market share at the expense of the impaired employer, will be under irresistible pressure to yield to the union's demands.

[2] The multiemployer mode of bargaining, traditionally seen as a defensive reaction by small employers, has become perhaps as important for unions as for employers. As counsel for the union in this case stated during oral argument, the limited funds and personnel of unions often make it very difficult for a union to negotiate separate agreements with each employer in industries where employer units are small.

to withdraw from a multiemployer bargaining unit. If the Court went no further, my objections would be minimal. In this case, however, there was much more than a mere impasse. At the time of the petitioner's withdrawal from the bargaining unit, the negotiations had been stalemated for more than six months, a selective strike and unitwide lockout had kept employees away from their jobs for five months, and there were no signs that the parties would return to the bargaining table. This was no "temporary deadlock or hiatus in negotiations" as the Board claims; this was instead a complete breakdown in negotiations coupled with a prolonged strike and lockout.[3] Nevertheless, the Court holds that employers in the multiemployer group could not withdraw.

The Court then goes on, stating that even when the union negotiates separate "interim" agreements with individual employers the remaining employers cannot withdraw from the bargaining group. Thus, with all of the members of a multiemployer group closed down or crippled by a strike or a lockout, the union is permitted to "divide and conquer" by coming to terms with some of the employers, allowing them to resume operations with a full staff. With one or more competitors fully back in business, the ability of the remaining employers to resist the union demands becomes greatly—and unfairly—diminished. Unable to withdraw, the remaining employers have no defense; they are forced either to submit to the union's demands or to allow fellow members of the group to profit from the strike or lockout. The effect of today's decision is "to deny self-help by employers when legitimate interests of employees and employers collide." *NLRB* v. *Truck Drivers*, 353 U. S. 87, 96 (1957) *(Buffalo Linen)*.

The Board has purported to follow an evenhanded approach to multiemployer bargaining. *The Evening News*

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[3] As the Board conceded during oral argument, its rule, now endorsed by this Court, prohibits withdrawal even if an impasse and a strike or lockout lasts as long as two years.

Assn., 154 N. L. R. B. 1494 (1965), enf'd *sub nom. Detroit Newspaper Publishers Assn.* v. *NLRB*, 372 F. 2d 569 (CA6 1967). By allowing the union to negotiate interim agreements in order to whipsaw the employer group and yet denying the employers the necessary defense of withdrawal, the Board is hardly living up to its asserted—and mandated—commitment to evenhandedness.

II

Maintenance of industrial peace requires balancing the interests of labor with those of management; the Court holds that the "difficult responsibility" of striking this balance lies with the Board subject only to "limited judicial review." But judicial review, although limited, is not absent:

> "[T]he phrase 'limited judicial review' [does] not mean that the balance struck by the Board is immune from judicial examination and reversal in proper cases. . . . [W]here, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'" *NLRB* v. *Brown*, *supra*, at 290–292, quoting *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318 (1965).

The Court's deferral to the Board's conclusion that its rules advance the national labor policy by enhancing stability and promoting collective bargaining represents just the kind of uncritical judicial rubberstamping we have often condemned. *NLRB* v. *Brown*, *supra*, at 291.

Contrary to the Board's conclusory statements, accepted by the Court, employers who execute interim agreements do not have an equivalent stake in promptly securing a reason-

able final agreement. Such employers are able to operate fully while their competitors are hampered by a strike or defensive lockout; employers covered by interim agreements have a natural economic interest in prolonging the deadlock, thereby increasing their competitive advantage over the employers who remain in the multiemployer group.

The Court also accepts the Board's naked assertion that "interim agreements . . . deter rather than promote unit fragmentation." It is difficult to imagine an event more likely to fragment a multiemployer group than a union's successful whipsawing. Certainly employers will be reluctant to continue their association with other employers who are now encouraged by the Board—and by this Court—selfishly to permit themselves to be used to force the group to yield to the union demands.[4]

Even without the negotiation of interim agreements, when the parties have remained at impasse for a lengthy period, withdrawal of one or a few employers may facilitate rather than frustrate bargaining. The present case is illustrative. Bargaining between the Teamsters and the association was at a stalemate when Bonanno Linen decided to withdraw. That withdrawal did not cause the immediate "disintegra-

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[4] The Court places great reliance on the notion that the union is only allowed to negotiate interim agreements with individual employers and that negotiation of permanent separate agreements not tied to the final association agreement would permit the remaining employers to withdraw from the unit. This reliance may be misplaced. In *Tobey Fine Papers of Kansas City*, 245 N. L. R. B. 1393 (1979), enf'd, 659 F. 2d 841, 107 LRRM 2221 (CA8 1981), the Board did not permit an employer to withdraw from a multiemployer group even though 2 of the 14 members (representing 42% of the group's employees) had withdrawn with union consent and negotiated separate, permanent agreements. The Board held that "it does not follow *ipso facto* that execution of individual separate final contracts with [withdrawn] Association members either proves an intention to destroy, or necessarily causes the fragmentation of, a multiemployer unit." 245 N. L. R. B., at 1395.

tion" of the bargaining unit, but instead provided the impetus for the union and the remaining employers ultimately to return to the bargaining table and reach agreement. Thus, Bonnano Linen's withdrawal can be seen as fostering the group collective-bargaining process rather than hindering it. In any event, an employer's withdrawal from the multiemployer group is no more disruptive of the bargaining process than a union's decision to use "divide and conquer" tactics.

Industrial peace, it must be remembered, is the primary objective of the federal labor laws; multiemployer bargaining is simply one of many tools used to try to achieve that goal for the benefit of both sides. When a union and a group of employers have reached an impasse and further negotiations would appear to be an exercise in futility, it is more consistent with that goal to permit withdrawal and allow negotiation of separate agreements than to force the parties into escalated economic warfare. Because of differing concerns, it is likely that employers will be able to negotiate agreements individually even though efforts to reach a group agreement failed. By instead forcing the parties to use their economic weapons, the Board's rule runs counter to the congressional goal of industrial peace.

III

In addition to arguing that its rule barring withdrawal upon impasse enhances the stability of multiemployer groups and promotes collective bargaining, the Board contends that an impasse is neither sufficiently unusual nor adequately determinable to support withdrawal. "Impasse" is a term of art in labor law; the presence of an impasse triggers other important consequences. At impasse, for example, either party may decline to negotiate further. See, *e. g.*, *NLRB* v. *Webb Furniture Corp.*, 366 F. 2d 314, 315 (CA4 1966). In addition, at impasse an employer may unilaterally make changes in terms and conditions of employment provided that the changes are consistent with the proposals it made at the

bargaining table. See, *e. g.*, *NLRB* v. *Tex-Tan, Inc.*, 318 F. 2d 472 (CA5 1963); *Taft Broadcasting Co.*, 163 N. L. R. B. 475 (1967), enf'd *sub nom. American Federation of Television and Radio Artists* v. *NLRB*, 129 U. S. App. D. C. 399, 395 F. 2d 622 (1968).

Because unions and employers have important rights which arise upon impasse, the Board and the courts have acquired considerable experience in determining whether an impasse exists. See, *e. g.*, *NLRB* v. *Tex-Tan, Inc.*, *supra*; *Taft Broadcasting Co.*, *supra*. It makes little sense to say, as the Board does here, that on the one hand an impasse is too common and indeterminable to permit withdrawal from a multiemployer bargaining unit while on the other hand maintaining that an impasse is sufficiently momentous and ascertainable to allow employers to stop bargaining and make unilateral changes. Moreover, if the Board, after nearly 40 years of dealing with the concept, finds impasse too ill-defined to permit withdrawal, it is high time that the Board exercise its presumed expertise and establish more definite guidelines to identify impasse. Unions and employers are entitled to that guidance.

The Court also accepts the Board's contention that "impasse may be 'brought about intentionally by one of the parties,'" and asserts that "permitting withdrawal at impasse would as a practical matter undermine the utility of multiemployer bargaining." The Court explains that permitting withdrawal upon impasse would allow employers to "precipitate an impasse in order to escape any agreement less favorable than the one expected." This argument ignores a basic element of impasse: impasse is reached only when a stalemate—a breakdown in bargaining—occurs after good-faith negotiations. *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217 (1949); *Cone Mills Corp.* v. *NLRB*, 413 F. 2d 445, 450 (CA4 1969). Intentionally refusing to agree in order to create an impasse and thus facilitate withdrawal—or trigger any of the other rights available upon impasse—is

hardly good-faith bargaining. *Industrial Union of Marine and Shipbuilding Workers* v. *NLRB*, 320 F. 2d 615 (CA3 1963), cert. denied *sub nom. Bethlehem Steel Co.* v. *NLRB*, 375 U. S. 984 (1964); *NLRB* v. *Herman Sausage Co.*, 275 F. 2d 229 (CA5 1960). The Board has ample means to deal with feigned bargaining.

IV

I would have little difficulty with a rule that a brief cessation of bargaining, without more, does not trigger a right to withdraw from a multiemployer bargaining unit. But the Board has gone much further. No impasse, we are told, no matter how long it lasts or how far apart the parties remain, permits withdrawal. Employers may not withdraw even after the union has negotiated separate agreements with some of the employers in order to force the others in the group into compliance. Absent a more reasonable alternative than that offered by the Board, I would adopt the rule of the Second, Third, and Ninth Circuits and permit withdrawal upon impasse.[5]

JUSTICE O'CONNOR, with whom JUSTICE POWELL joins, dissenting.

I join THE CHIEF JUSTICE in the introductory comments and Part I of his dissent. However, I write separately because I believe labor peace would be advanced by avoiding the absolute positions adopted both by the majority and by the dissent of THE CHIEF JUSTICE. Because I am convinced that the Board should examine the circumstances surrounding and following an impasse to determine whether an unusual circumstance sufficient to justify withdrawal has occurred, and because I cannot accept the Court's conclusory

[5] *NLRB* v. *Independent Assn. of Steel Fabricators*, 582 F. 2d 135 (CA2 1978), cert. denied *sub nom. Shopmen* v. *NLRB*, 439 U. S. 1130 (1979); *NLRB* v. *Beck Engraving Co.*, 522 F. 2d 475 (CA3 1975); *NLRB* v. *Associated Shower Door Co.*, 512 F. 2d 230 (CA9), cert. denied, 423 U. S. 893 (1975).

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statements concerning the effects of all interim agreements, I respectfully dissent.

I

The Court agrees with the Board that an impasse is not an unusual circumstance "sufficiently destructive of group bargaining to justify unilateral withdrawal." The Board adopted that position after identifying an impasse as (1) simply a "temporary deadlock or hiatus in negotiations" (2) which may be brought about intentionally by one of the parties and (3) which in almost all cases is "eventually broken, either through a change of mind or the application of economic force." *Charles D. Bonanno Linen Service, Inc.*, 243 N. L. R. B. 1093, 1093–1094 (1979). There are, of course, impasses that fit this description. Others do not. Unfortunately, having developed its premise, the Board has chosen to ignore the reasons which justified it and now "reasons" that an impasse, regardless of duration, does not justify employer withdrawal. The problem with the Board's approach is that it reasons by definition. That is, while an impasse may be a temporary deadlock, a deadlock cannot be made temporary simply by calling it an impasse. Thus, while the rule may be efficient, it does not contribute to principled decisionmaking. This case provides an excellent example of the result which obtains when the Board applies a general rule without analysis of the particular factual situation.

More than a temporary lull in negotiations developed here. When Bonanno withdrew from the bargaining unit in November, the parties had been deadlocked for more than six months. Nevertheless, although the Board defines an impasse as a "temporary" deadlock, it inexplicably views the passage of time as irrelevant to the question of whether something more than a "hiatus" in negotiations was involved.[1]

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[1] As THE CHIEF JUSTICE notes in his dissent, the Board conceded during oral argument that it will not regard an impasse as an unusual circumstance even if it continues for two years.

Closely related to the Board's view of an impasse as temporary is its view that an impasse is not an unusual circumstance because it is broken in almost all cases either through a change of mind or by the application of economic forces. However, in this case the Board did not determine whether, when Bonanno withdrew, the parties were likely to have broken the impasse. The union and association had unsuccessfully utilized the most common economic weapons: the union had called a selective strike; association members had locked out their drivers; and Bonanno had hired replacement drivers.[2] The Board made no finding that the arsenal of this union or these employers contained additional economic weapons which, if used, might have ended the impasse.

Moreover, neither the Board nor any party to the negotiations suggested that Bonanno precipitated the May 15 impasse as a means to excuse its withdrawal from the association. The Board's third identifying feature of an impasse is thus also missing from this situation.

The impasse which all parties agree existed on May 15 may fit the Board's definition of impasse; the situation which existed on November 21 does not. The point is not that this Court should substitute its judgment as to the "significance of impasse and the dynamics of collective bargaining" for that of the Board. The point is that the Board should be required to analyze, not simply label, a deadlock in negotiations. If the Board had utilized its expertise to examine the facts of this case, it well might have found a complete breakdown in negotiations, not a temporary impasse. When such a complete breakdown occurs, I would afford an employer a right to withdraw.

II

Neither can I agree with the Court's conclusion that employers who execute interim agreements invariably maintain

[2] The parties submitted this dispute on stipulated facts which do not indicate whether other association members hired temporary workers after the strike and lockout, a step which they had the right to take. *NLRB* v. *Brown*, 380 U. S. 278 (1965).

an equivalent stake in securing a final agreement and that interim agreements always deter fragmentation of the employer unit. That conclusion, like the "impasse rule" adopted today, sweeps too broadly. The conclusion is least likely to be accurate when applied to a highly competitive industry which relies upon skilled workers and counts heavily upon repetitive patronage. If one member of a struck employer association in such an industry reaches an interim agreement, he will gain a competitive advantage sufficient to produce a natural and powerful interest in prolonging the deadlock. In fact, the Board has found that an employer with such an advantage is less likely to push for prompt settlement of the labor dispute. See, *e. g.*, *Connell Typesetting Co.*, 212 N. L. R. B. 918 (1974). Moreover, as we recognized in *NLRB* v. *Brown*, 380 U. S. 278 (1965), the notion that allowing a practice which unfairly advantages one employer would "succeed in breaking up the employer association was not at all fanciful." *Id.*, at 284. Likewise, when an interim agreement affords one employer a competitive advantage, the notion that allowing the agreement will promote fragmentation of the bargaining unit is not at all fanciful.

Other factors could also affect the impact of an interim agreement. For instance, an agreement between a union and the employer of 40 percent of a work force could shatter a bargaining unit. Such an agreement with an employer of two percent of the work force might have little effect. No magic inheres in the word "interim," as none inheres in "impasse." Identification of an agreement as "interim" rather than "final" is the beginning, not the end, of the required analysis of the agreement's effect on the bargaining unit. Yet, today the Court gives blanket approval of any interim agreement.[3] Here too, I would require the Board to apply

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[3] By adopting a *per se* rule that interim agreements never fragment the bargaining unit, the Court takes a position more extreme than that urged by the Board. At least until today, the Board has allowed employer with-

its expertise to determine the effect of such an agreement in a particular instance rather than approve the Board's practice of decision by label. If an agreement, interim or final, operates to fragment a bargaining unit, I would allow withdrawal by an employer.

III

The goal of multiemployer bargaining is to promote "labor peace through strengthened collective bargaining." *NLRB* v. *Truck Drivers*, 353 U. S. 87, 95 (1957). Neither a complete breakdown in negotiations nor a fragmented bargaining unit furthers that goal. Because today's decision allows both, I dissent.

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drawal when interim agreements resulted in unit fragmentation. See, *e. g.*, *Typographic Service Co.*, 238 N. L. R. B. 1565 (1978); *Connell Typesetting Co.*, 212 N. L. R. B. 918 (1974). Approval of a rule so favorable to one party to negotiations is hardly the way to encourage multiemployer bargaining or industrial peace.

CABELL, ACTING CHIEF PROBATION OFFICER OF LOS ANGELES COUNTY, ET AL. *v.* CHAVEZ-SALIDO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 80–990. Argued November 3, 1981—Decided January 12, 1982

Section 1031(a) of the Cal. Gov't Code Ann. (West 1980) requires "public officers or employees declared by law to be peace officers" to be United States citizens; § 830.5 of the Cal. Penal Code Ann. (West Supp. 1981) declares probation officers and deputy probation officers to be "peace officers." Appellees, lawfully admitted permanent resident aliens, after unsuccessfully applying for positions as Deputy Probation Officers in Los Angeles County, filed suit in Federal District Court challenging the statutory citizenship requirement under, *inter alia*, the Equal Protection Clause of the Fourteenth Amendment and seeking declaratory, injunctive, and other relief. The District Court held the requirement unconstitutional both on its face and as applied to appellees.

Held: The statutory citizenship requirement is valid. Pp. 436–447.

(a) While a restriction on lawfully resident aliens that primarily affects economic interests is subject to strict judicial scrutiny, such scrutiny is out of place when the restriction primarily serves a political function. A claim that a particular restriction on legally resident aliens serves political and not economic goals is to be evaluated in a two-step process. *Sugarman* v. *Dougall*, 413 U. S. 634. First, the specificity of the classification will be examined: a classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends. Second, even if the classification is sufficiently tailored, it may be applied in the particular case only to "persons holding state elective or important nonelective executive, legislative, and judicial positions." *Sugarman* v. *Dougall*, *supra*, at 647. Pp. 436–441.

(b) The statutes in question are an attempt to limit the exercise of the sovereign's coercive police powers over the community to citizens. They are sufficiently tailored in light of that aim to withstand a facial challenge when reviewed under the appropriate equal protection standard for such an exercise of sovereign power. Pp. 441–444.

(c) Probation officers sufficiently partake of the sovereign's power to exercise coercive force over the individual that they may be required to be citizens. Although the range of individuals over whom such officers exercise supervisory authority is limited, the officers' power with respect to those individuals is broad. A citizenship requirement is an appropriate limitation on those who exercise and, therefore, symbolize this power of the political community over those who fall within its jurisdiction. Pp. 444–447.

490 F. Supp. 984, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 447.

William F. Stewart argued the cause for appellants. With him on the briefs was *John H. Larson*.

Mary S. Burdick argued the cause for appellees. With her on the brief was *Dan Stormer*.*

JUSTICE WHITE delivered the opinion of the Court.

In this case we once again consider a citizenship requirement imposed by a State on those seeking to fill certain governmental offices. California Gov't Code Ann. § 1031(a) (West 1980) requires "public officers or employees declared by law to be peace officers" to be citizens of the United States. California Penal Code Ann. § 830.5 (West Supp. 1981) provides that probation officers and deputy probation officers are "peace officers." A three-judge District Court of the Central District of California held the California requirement unconstitutional both on its face and as applied to the appellees, who sought positions as Deputy Probation Officers. 490 F. Supp. 984.

**Robert Newman* filed a brief for Service Employees International Union, Local 535, as *amicus curiae* urging affirmance.

Peter A. Schey, *Fred Okrand*, and *Mary K. Gillespie* filed a brief for the League of United Latin American Citizens as *amicus curiae*.

I

Appellees were, at the time the complaint was filed, lawfully admitted permanent resident aliens living in Los Angeles County, Cal.[1] Each applied unsuccessfully for positions as Deputy Probation Officers with the Los Angeles County Probation Department.[2] With respect to two of the three appellees, the parties stipulated that the failure to obtain the positions sought was the result of the statutory citizenship requirement.[3]

Appellees filed a complaint in the United States District Court for the Central District of California challenging the constitutionality of the citizenship requirement under the Equal Protection Clause of the Fourteenth Amendment and 42 U. S. C. §§ 1981 and 1983. Named as defendants were certain individual county officials, in their official capacity, and the County of Los Angeles.[4]

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[1] One of the appellees, Chavez-Salido, subsequently became a citizen. By that time, however, there were no longer any openings for the job he had previously been denied on the grounds of his noncitizenship. Appellees, at the time they applied for the positions in question, were all lawfully present, resident aliens. Therefore, we do not consider, and intimate no opinion about, any limits the Constitution may place upon state action directed at aliens who are here without the permission of the Federal Government or who, if legally here, are not residents of the State.

[2] Under the California statute, the kinds of responsibilities of deputy probation officers are the same as those of probation officers and both are considered "peace officers." Cal. Penal Code Ann. § 830.5 (West Supp. 1981). This opinion, therefore, will refer simply to "probation officers" in discussing the positions at issue.

[3] The third appellee, Bohorquez, claimed only that he failed to appeal a test score that disqualified him, because he had been informed that without citizenship an appeal would be useless. As relief in this suit, Bohorquez sought only an opportunity to take a new examination.

[4] Although the individual defendants did not contest the jurisdiction of the federal court, the county did. In their complaint, appellees waived any claim against the county under 42 U. S. C. § 1983—the complaint was

Appellees alleged unconstitutional discrimination against aliens, impermissible infringement upon their constitutional right to travel, and unconstitutional interference with Congress' plenary power to regulate aliens. They sought declaratory and injunctive relief, as well as attorney's fees and damages for two of the plaintiffs. A three-judge court was properly convened. 28 U. S. C. §§ 2281 (1970 ed.), 2284.[5]

In February 1977, the District Court concluded that the statutory citizenship requirement was unconstitutional both on its face and as applied. *Chavez-Salido* v. *Cabell*, 427 F. Supp. 158. That decision rested entirely on appellees' arguments under the Equal Protection Clause; it did not reach the right to travel and federal pre-emption claims. This Court vacated and remanded that judgment for further consideration in light of *Foley* v. *Connelie*, 435 U. S. 291 (1978), which upheld a New York statute requiring state troopers to be United States citizens. *County of Los Angeles* v. *Chavez-Salido*, 436 U. S. 901 (1978). On remand, the District Court reconsidered its previous position in light of both *Foley*, *supra*, and *Ambach* v. *Norwick*, 441 U. S. 68 (1979),

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filed before this Court's decision in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), which held that such an action could be brought against a county. Appellees argued, and the District Court agreed, that they did have a claim against the county directly under the Fourteenth Amendment and under 42 U. S. C. § 1981, with jurisdiction in the Federal District Court under 28 U. S. C. § 1331(a) because there was more than $10,000 in controversy. In its second opinion, the District Court readopted its earlier jurisdictional holdings and declined to release appellees from their previous waiver of a possible claim against the county under § 1983. Given our resolution of the merits and because jurisdiction over the individual defendants is clear, we need not evaluate or otherwise accept the District Court's jurisdictional findings with respect to the county.

[5] Congress has since limited the availability of three-judge courts, The Three-Judge Court Amendments of 1976, Pub. L. 94-381, 90 Stat. 1119. This case, however, is not affected by those changes, which do not apply to actions commenced before the date of the new statute's enactment.

which held that a State may refuse to employ as elementary and secondary school teachers aliens who are eligible for United States citizenship but fail to seek naturalization. With Judge Curtis dissenting, the court found its prior views still valid and convincing. It, therefore, came to the identical conclusion that the California statutory scheme was constitutionally invalid both facially and as applied.

We noted probable jurisdiction, 450 U. S. 978 (1981), and now reverse.

II

Over the years, this Court has many times considered state classifications dealing with aliens. See, *e. g.*, *Ambach* v. *Norwick*, *supra*; *Nyquist* v. *Mauclet*, 432 U. S. 1 (1977); *Foley* v. *Connelie*, *supra*; *Examining Board* v. *Flores de Otero*, 426 U. S. 572 (1976); *In re Griffiths*, 413 U. S. 717 (1973); *Sugarman* v. *Dougall*, 413 U. S. 634 (1973); *Graham* v. *Richardson*, 403 U. S. 365 (1971); *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410 (1948); *Crane* v. *New York*, 239 U. S. 195 (1915); *Heim* v. *McCall*, 239 U. S. 175 (1915); *Truax* v. *Raich*, 239 U. S. 33 (1915); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). As we have noted before, those cases "have not formed an unwavering line over the years." *Ambach* v. *Norwick*, *supra*, at 72. But to say that the decisions do not fall into a neat pattern is not to say that they fall into no pattern. In fact, they illustrate a not unusual characteristic of legal development: broad principles are articulated, narrowed when applied to new contexts, and finally replaced when the distinctions they rely upon are no longer tenable.

In *Yick Wo* v. *Hopkins*, *supra*, the Court held both that resident aliens fall within the protection of the Equal Protection Clause of the Fourteenth Amendment and that the State could not deny to aliens the right to carry on a "harmless and useful occupation" available to citizens. Although *Yick Wo* proclaimed that hostility toward aliens was not a permissible

ground for a discriminatory classification, it dealt only with a situation in which government had actively intervened in the sphere of private employment. In a series of later cases it became clear that *Yick Wo* did not mean that the State had to be strictly neutral as between aliens and citizens: The Court continued to uphold the right of the State to withhold from aliens public benefits and public resources. *Terrace* v. *Thompson*, 263 U. S. 197 (1923) (ownership of land); *Heim* v. *McCall*, *supra* (employment on public works projects); *Patsone* v. *Pennsylvania*, 232 U. S. 138 (1914) (taking of wild game).

This distinction between government distribution of public resources and intervention in the private market was clearly established as the principle by which state regulations of aliens were to be evaluated in *Truax* v. *Raich*, *supra*, which struck down a state statute requiring all employers of more than five workers to employ "not less than eighty (80) per cent qualified electors or native born citizens of the United States:"

> "The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and citizens of other States." *Id.*, at 39–40.

This public/private distinction, the "special public interest" doctrine, see *Graham* v. *Richardson*, *supra*, at 372, 374; *Sugarman* v. *Dougall*, *supra*, at 643, 644, was challenged in *Takahashi* v. *Fish & Game Comm'n*, *supra*, which held that California could not bar lawfully resident aliens from obtaining commercial fishing licenses:

> "To whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California, we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents

> of the State from making a living by fishing in the ocean off its shores while permitting all others to do so." *Id.*, at 421.

As the principle governing analysis of state classifications of aliens, who are lawful residents, the distinction was further eroded in *Graham* v. *Richardson*, *supra*, which read *Takahashi* as "cast[ing] doubt on the continuing validity of the special public-interest doctrine in all contexts," 403 U. S., at 374, and held that a State could not distinguish between lawfully resident aliens and citizens in the distribution of welfare benefits. Returning to *Yick Wo*'s holding that lawfully present aliens fall within the protection of the Equal Protection Clause and citing the more recent theory of a two-tiered equal protection scrutiny, *Graham* implied that there would be very few—if any—areas in which a State could legitimately distinguish between its citizens and lawfully resident aliens:

> "Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate. Accordingly, it was said in *Takahashi*, 334 U. S., at 420, that 'the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.'" 403 U. S., at 372.

The cases through *Graham* dealt for the most part with attempts by the States to retain certain economic benefits exclusively for citizens. Since *Graham*, the Court has confronted claims distinguishing between the economic and sovereign functions of government. This distinction has been supported by the argument that although citizenship is not a relevant ground for the distribution of economic benefits, it is a relevant ground for determining membership in the political community. "We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.'" *Sugarman* v.

Dougall, 413 U. S., at 642. While not retreating from the position that restrictions on lawfully resident aliens that primarily affect economic interests are subject to heightened judicial scrutiny, *ibid.*; *In re Griffiths*, *supra*; *Examining Board* v. *Flores de Otero*, *supra*, we have concluded that strict scrutiny is out of place when the restriction primarily serves a political function: "[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives [and] constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders." *Sugarman* v. *Dougall*, *supra*, at 648. We have thus "not abandoned the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government." *Ambach* v. *Norwick*, 441 U. S., at 73–74. And in those areas the State's exclusion of aliens need not "clear the high hurdle of 'strict scrutiny,' because [that] would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic value of citizenship.'" *Foley* v. *Connelie*, 435 U. S., at 295 (citation omitted).[6]

The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by

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[6] At times the dissent seems to imply that our cases do not establish a two-tiered standard of review—*e. g.*, "*[Sugarman]* did not condone a looser standard for review of classifications barring aliens from 'political jobs.'" *Post*, at 453. At other times, however, the dissent explicitly refers to the "*Sugarman* exception" as requiring "[l]ess demanding scrutiny . . . for statutes deriving from 'a State's historical power to exclude aliens from participation in its democratic political institutions.'" *Post*, at 456.

definition those outside of this community. Judicial incursions in this area may interfere with those aspects of democratic self-government that are most essential to it. This distinction between the economic and political functions of government has, therefore, replaced the old public/private distinction. Although this distinction rests on firmer foundations than the old public/private distinction, it may be difficult to apply in particular cases.

Sugarman advised that a claim that a particular restriction on legally resident aliens serves political and not economic goals is to be evaluated in a two-step process. First, the specificity of the classification will be examined: a classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends. The classification in *Sugarman* itself—all members of the competitive civil service—could not support the claim that it was an element in "the State's broad power to define its political community," 413 U. S., at 643, because it indiscriminately swept in menial occupations, while leaving out some of the State's most important political functions. Second, even if the classification is sufficiently tailored, it may be applied in the particular case only to "persons holding state elective or important nonelective executive, legislative, and judicial positions," those officers who "participate directly in the formulation, execution, or review of broad public policy" and hence "perform functions that go to the heart of representative government." *Id.*, at 647.[7] We must therefore inquire whether the "posi-

[7] The full quotation from *Sugarman* is as follows:

"'[E]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.' *Boyd* v. *Nebraska ex rel. Thayer*, 143 U. S. 135, 161 (1892). See *Luther* v. *Borden*, 7 How. 1, 41 (1849); *Pope* v. *Williams*, 193 U. S. 621, 632–633 (1904). Such power inheres in the State by virtue of its obligation, already noted above, 'to preserve the basic conception of a political community.' *Dunn* v. *Blumstein*, 405 U. S., at 344. And this power and responsibility of the State applies,

tion in question . . . involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community." *Foley* v. *Connelie*, *supra*, at 296.

The restriction at issue in this case passes both of the *Sugarman* tests.

III

Appellees argue, and the District Court agreed, that Cal. Gov't Code Ann. § 1031(a) (West 1980), which requires all state "peace officers" to be citizens, is unconstitutionally overinclusive: "Section 1031(a) is void as a law requiring citizenship which 'sweeps too broadly.'" 490 F. Supp., at 986.[8] The District Court failed to articulate any standard in reaching this conclusion. Rather, it relied wholly on its belief that

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not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who 'participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.'" 413 U. S., at 647.

This language is far reaching and no limits on it were suggested by *Sugarman* itself: almost every governmental official can be understood as participating in the execution of broad public policies. The limits on this category within which citizenship is relevant to the political community are not easily defined, but our cases since *Sugarman*—*Foley* v. *Connelie*, 435 U. S. 291 (1978), and *Ambach* v. *Norwick*, 441 U. S. 68 (1979)—suggest that this Court will not look to the breadth of policy judgments required of a particular employee. Rather, the Court will look to the importance of the function as a factor giving substance to the concept of democratic self-government.

[8] Both the District Court and the parties mistakenly refer to this argument as one based on the constitutional doctrine of "overbreadth." "Overbreadth" is a doctrine of standing applicable in certain First Amendment cases and under which litigants may assert the rights of others not presently before the court. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 611–615 (1973). Appellees do not claim to be asserting the constitutional rights of others; rather, they claim that California denies them the equal protection of the laws because the restriction is so overinclusive that it destroys the State's asserted justification.

of the more than 70 positions included within the statutory classification of "peace officer," some undefined number of them "cannot be considered members of the political community no matter how liberally that category is viewed." *Id.*, at 987. The District Court's entire argument on this point consisted of just one sentence: "There appears to be no justification whatever for excluding aliens, even those who have applied for citizenship, from holding public employment as cemetery sextons, furniture and bedding inspectors, livestock identification inspectors, and toll service employees." *Id.*, at 986. In believing this sufficient, the District Court applied a standard of review far stricter than that approved in *Sugarman* and later cases.

We need not hold that the District Court was wrong in concluding that citizenship may not be required of toll-service employees, cemetery sextons, and inspectors to hold that the District Court was wrong in striking down the statute on its face.[9] The District Court assumed that if the statute was overinclusive at all, it could not stand. This is not the proper standard. Rather, the inquiry is whether the restriction reaches so far and is so broad and haphazard as to belie the State's claim that it is only attempting to ensure that an important function of government be in the hands of those having the "fundamental legal bond of citizenship." *Ambach* v. *Norwick*, 441 U. S., at 75. Under this standard, the classifications used need not be precise; there need only be a substantial fit. Our examination of the California scheme convinces us that it is sufficiently tailored to withstand a facial challenge.

The general requirements, including citizenship, for all California peace officers are found in Cal. Gov't Code Ann.

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[9] It is worth noting, however, that of the categories mentioned by the District Court, toll-service employees, inspectors of the Bureau of Livestock, and cemetery sextons were all eliminated from coverage by amendments to Cal. Penal Code Ann. § 830.4 (West Supp. 1981), passed in 1980. 1980 Cal. Stats., ch. 1340, p. 4724, § 12, effective Sept. 30, 1980.

§ 1031 (West 1980). That section, however, does not designate any particular official as a peace officer; rather, Cal. Penal Code Ann. § 830 (West Supp. 1981) lists the specific occupations that fall within the general category of "peace officer." Even a casual reading of the Penal Code makes clear that the unifying character of all categories of peace officers is their law enforcement function. Specific categories are defined by either their geographical jurisdiction or the specific substantive laws they have the responsibility to enforce. Thus, not surprisingly, the first categories listed include police officers at the county, city, and district levels. § 830.1. This is followed by various categories of police power authorized by the State: *e. g.*, highway patrol officers, the state police, and members of the California National Guard when ordered into active service. § 830.2. After this, the statute includes a long list of particular officers with responsibility for enforcement of different substantive areas of the law: *e. g.*, individuals charged with enforcement of the alcoholic beverage laws, the food and drug laws, fire laws, and the horse racing laws. § 830.3. Finally, there are several catchall provisions that include some officers with narrow geographic responsibilities—*e. g.*, park rangers, San Francisco Bay Area Rapid Transit District police, harbor police, community college police, security officers of municipal utility districts, and security officers employed in government buildings—and some with narrow "clientele"—*e. g.*, welfare-fraud or child-support investigators, correctional officers, parole and probation officers. §§ 830.31–830.6.

Although some of these categories may have only a tenuous connection to traditional police functions of law enforcement, the questionable classifications are comparatively few in number.[10] The general law enforcement character of all

[10] The dissent specifically questions only four positions. *Post*, at 455, n. 7. Three of these—Dental Board Inspectors, Parks and Recreation Department employees, and voluntary fire wardens—are designated "peace officers" only when their "primary duty" is law enforcement. See Cal. Penal Code Ann. §§ 830.3(b), (c), (j) (West Supp. 1980).

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California "peace officers" is underscored by the fact that all have the power to make arrests, § 836, and all receive a course of training in the exercise of their respective arrest powers and in the use of firearms. § 832. *Foley* made clear that a State may limit the exercise of the sovereign's coercive police powers over the members of the community to citizens. The California statutes at issue here are an attempt to do just that. They are sufficiently tailored in light of that aim to pass the lower level of scrutiny we articulated as the appropriate equal protection standard for such an exercise of sovereign power in *Sugarman*.[11]

IV

The District Court also held that the citizenship requirement was invalid as applied to the positions at issue here—deputy probation officers. In reaching this conclusion, it focused too narrowly on a comparison of the characteristics and functions of probation officers with those of the state troopers at issue in *Foley* and the teachers in *Ambach*. *Foley* and *Ambach* did not describe the outer limits of permissible citizenship requirements. For example, although both of those cases emphasized the communitywide responsibilities of teachers and police, there was no suggestion that judges, who deal only with a narrow subclass of the community, cannot be subject to a citizenship requirement. See *Sugarman*, 413 U. S., at 647. Similarly, although both *Foley* and *Ambach* emphasized the unsupervised discretion that must be exercised by the teacher and the police officer in the performance of their duties, neither case suggested that jurors, who act under a very specific set of instructions, could not be required to be citizens. See *Perkins* v. *Smith*, 370 F. Supp.

[11] The dissent accuses the Court of holding that the law enforcement character of some of the covered positions justifies application of the citizenship restriction to unrelated positions. *Post*, at 455. We indicate no opinion as to whether noncitizen applicants for other positions could successfully challenge the statute as applied to them.

134 (Md 1974), summarily aff'd, 426 U. S. 913 (1976). Definition of the important sovereign functions of the political community is necessarily the primary responsibility of the representative branches of government, subject to limited judicial review.[12]

Looking at the functions of California probation officers, we conclude that they, like the state troopers involved in *Foley*, sufficiently partake of the sovereign's power to exercise coercive force over the individual that they may be limited to citizens. Although the range of individuals over whom probation officers exercise supervisory authority is limited, the

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[12] Appellees also argue that the statute is facially invalid because it is impermissibly underinclusive. The District Court did not consider this contention, and the only argument advanced by appellees in support of this claim is that California fails to impose a citizenship requirement upon its public school teachers. Brief for Appellees 29. At various points, the dissent also relies upon the alleged underinclusiveness of the statute.

Although there is some language in *Sugarman* indicating that such an argument is appropriate, 413 U. S., at 640, 642, and that a statutory exclusion of aliens from a particular form of public employment will be evaluated in light of the entire framework of public employment positions open and closed to aliens, clearly our subsequent cases have not adopted that position. Thus, in both *Foley* and *Ambach* only the specific governmental functions directly at issue were considered. Underinclusiveness arguments were relevant in *Sugarman* because there the classification involved—the competitive civil service—swept in a wide variety of governmental functions. Such a sweeping and apparently indiscriminate categorization raises legitimate questions of arbitrariness that are not raised when the State limits a particular and important governmental function—*e. g.*, coercive police power—to citizens. When we deal with such a specific category, underinclusiveness arguments are relevant only within the category: Are there, for example, individuals who exercise the State's coercive police power that are not required to be citizens? In this respect, the California statutory scheme is not substantially underinclusive: Cal. Penal Code Ann. § 830.7 (West Supp. 1981) lists only two categories of positions which have the power to arrest but are not "peace officers"—and therefore are not subject to the citizenship requirement—security officers at institutions of higher education and certain individuals designated by a cemetery authority.

powers of the probation officer are broad with respect to those over whom they exercise that authority.[13] The probation officer has the power both to arrest, Cal. Penal Code Ann. §§ 830.5, 836, 1203.2 (West Supp. 1981); Cal. Civ. Proc. Code Ann. § 131.4 (West 1954); and to release those over whom he has jurisdiction. Cal. Penal Code Ann. § 1203.1a (West Supp. 1981). He has the power and the responsibility to supervise probationers and insure that all the conditions of probation are met and that the probationer accomplishes a successful reintegration into the community. Cal. Penal Code Ann. § 1203.1 (West Supp. 1981). With respect to juveniles, the probation officer has the responsibility to determine whether to release or detain offenders, Cal. Welf. & Inst. Code Ann. § 628 (West Supp. 1981), and whether to institute judicial proceedings or take other supervisory steps over the minor. §§ 630, 653–654. In carrying out these responsibilities the probation officer necessarily has a great deal of discretion that, just like that of the police officer and the teacher, must be exercised, in the first instance, without direct supervision:

> "Because the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has

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[13] Measuring the scope of community contacts is more difficult than it may appear. Although the probation officer has responsibility for only a relatively small part of the community, in exercising that responsibility the probation officer necessarily comes in contact with a much broader section of the community. His supervisory responsibilities will bring him into contact with many of those with whom those under his supervision must interact—*e. g.*, employers, teachers, landlords, and family. In this respect he is very much like a policeman, who exercises his coercive authority over a small class of individuals, but carries out his responsibilities through interactions with a much larger segment of the community.

been armed with the power to recommend or even to declare revocation." *Gagnon* v. *Scarpelli*, 411 U. S. 778, 784 (1973).

One need not take an overly idealistic view of the educational functions of the probation officer during this period to recognize that the probation officer acts as an extension of the judiciary's authority to set the conditions under which particular individuals will lead their lives and of the executive's authority to coerce obedience to those conditions.[14] From the perspective of the probationer, his probation officer may personify the State's sovereign powers; from the perspective of the larger community, the probation officer may symbolize the political community's control over, and thus responsibility for, those who have been found to have violated the norms of social order. From both of these perspectives, a citizenship requirement may seem an appropriate limitation on those who would exercise and, therefore, symbolize this power of the political community over those who fall within its jurisdiction.

Therefore, the judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

Appellees Jose Chavez-Salido, Pedro Luis Ybarra, and Ricardo Bohorquez are American-educated Spanish-speaking

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[14] Thus we do not find compelling the statistics presented by *amicus* Service Employees International Union, and cited by appellees at oral argument, Tr. of Oral Arg. 40, which indicate that because of a growing caseload, the time a probation officer has to spend with any individual offender may be minimal.

lawful residents of Los Angeles County, California.[1] Seven years ago, each had a modest aspiration—to become a Los Angeles County "Deputy Probation Officer, Spanish-speaking." Each was willing to swear loyalty to the State and Federal Governments; indeed, appellee Chavez-Salido declared his intent to become a citizen. By competitive examination, two of the appellees, and possibly the third, demonstrated their fitness for the jobs they desired.[2] Appellants denied them those jobs solely because they were not citizens.

The Court today concludes that appellees' exclusion from their chosen profession is "a necessary consequence of the community's process of political self-definition." *Ante*, at 439. The Court reaches this conclusion by misstating the standard of review it has long applied to alienage classifications. It then asserts that a lawfully admitted permanent resident alien is disabled from serving as a deputy probation

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[1] Chavez-Salido, born in Mexico, has been a permanent legal resident of this country for 26 years. He has received all his formal education in California, including a Bachelor of Arts degree in Mexican-American studies from California State College at Long Beach.

Ybarra, born in Spain, has been a permanent resident of this country since 1972. He possesses a Bachelor of Arts degree in theology from Camillas University in Spain, and a Master of Arts degree in African Studies from the University of California at Los Angeles. He is working for another Master's degree, in sociology, at California State University at Northridge.

Bohorquez, born in Colombia, has been a permanent resident of this country since 1961. He has a Bachelor of Arts degree in Latin-American studies from the University of California at Los Angeles. App. 19–23.

[2] Chavez-Salido scored 95 out of 100 on a qualifying oral examination for the Deputy Probation Officer (DPO) II, Spanish-speaking, position and 100 out of 100 on the oral examination for the DPO Trainee position, but was offered neither job solely because of his citizenship. Ybarra was denied employment after passing examinations for the DPO Trainee and DPO II positions. Bohorquez did not pass his initial oral examination for DPO II, but did not appeal his examination results after appellants told him his alienage made an appeal useless. *Id.*, at 19–24.

officer because that job "'go[es] to the heart of representative government.'" *Ante*, at 440, quoting *Sugarman* v. *Dougall*, 413 U. S. 634, 647 (1973).

In my view, today's decision rewrites the Court's precedents, ignores history, defies common sense, and reinstates the deadening mantle of state parochialism in public employment. I must dissent.

I

The Court properly acknowledges that our decisions regarding state discrimination against permanent resident aliens have formed a pattern. *Ante*, at 436. Since *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), this Court has recognized and honored the right of a lawfully admitted permanent resident alien to work for a living in the common occupations of the community. In *Truax* v. *Raich*, 239 U. S. 33, 41 (1915), the Court declared that right to be

> "the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. . . . If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."

In *Sugarman* v. *Dougall*, *supra*, we expressly refused to exempt public employment positions from this general rule. *Sugarman*, an 8–1 decision, struck down as facially inconsistent with the Equal Protection Clause a New York statute that excluded lawfully admitted aliens from all state civil service jobs offered on the basis of competitive examinations. *Sugarman* directed that permanent resident aliens may not be barred *as a class* from the common *public* occupations of the community. There, as here, the State had asserted its substantial interest in ensuring "that sovereign functions must be performed by members of the State." Brief for Appellants in *Sugarman* v. *Dougall*, O. T. 1972, No. 71–1222,

p. 10. Without denying the weight of that interest, the Court concluded that, "judged in the context of the State's broad statutory framework and the justifications the State present[ed]," 413 U. S., at 640, the State's chosen means were insufficiently precise to uphold its broad exclusion of aliens from public employment.

Since *Sugarman*, the Court consistently has held that in each case where the State chooses to discriminate against permanent resident aliens, "the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 605 (1976). See also *Nyquist* v. *Mauclet*, 432 U. S. 1, 7 (1977); *In re Griffiths*, 413 U. S. 717, 721–722 (1973); *Graham* v. *Richardson*, 403 U. S. 365, 376 (1971). "Alienage classifications by a State that do not withstand this stringent examination cannot stand." *Nyquist* v. *Mauclet*, 432 U. S., at 7.

Applying this stringent standard here, I would hold that, on its face, Cal. Gov't Code Ann. § 1031(a) (West 1980) violates the Equal Protection Clause. Section 1031(a) makes citizenship one of six unrelated prerequisites for employment as a "public office[r] or employe[e] declared by law to be [a] peace office[r]."[3] Scattered sections of the California Code then designate a variegated collection of public employees as "peace officers," who by definition must be citizens. When appellees first sought their jobs, the "peace officer" category encompassed more than 70 public occupations, including such apparently unrelated positions as toll takers, cemetery sex-

[3] Section 1031(a) provides that a peace officer must be at least 18, fingerprinted, of good moral character, a high school graduate (or the equivalent thereof), physically and mentally healthy, and "a citizen of the United States."

tons, fish and game wardens, furniture and bedding inspectors, voluntary fire wardens, racetrack investigators, county coroners, State Supreme Court and Courts of Appeal bailiffs, messengers at the State Treasurer's office, and inspectors for the Board of Dental Examiners. See *Chavez-Salido* v. *Cabell*, 427 F. Supp. 158, 169–170, n. 22 (CD Cal. 1977) (listing positions). To this day, the legislature has offered no reason why such divergent classes of public jobs were gathered under the "peace officer" umbrella.[4]

The history of the statute, reviewed by the District Court, suggests the answer. Before 1961, California did not require any of its peace officers to be citizens. See 490 F. Supp. 984, 986 (CD Cal. 1980). Indeed, in 1851, California granted only sheriffs, policemen, marshals, and constables statutory "peace officer" status. *Id.*, at 986, n. 4. For more than a century, the State did not reserve even those four occupations for citizens. Over the decades, dozens of subsequent enactments added other public positions to the "peace officer" list, but none required peace officers to be citizens. *Ibid.* Some positions were added to the list for reasons totally unrelated to logic.[5]

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[4] After this litigation began, and the District Court had twice declared § 1031(a) unconstitutional, the California Legislature twice amended sections of its Penal Code, removing some positions from the "peace officer" list and adding others. See 490 F. Supp. 984, 986–987, n. 6 (CD Cal. 1980) (listing additions to and deletions from the peace officer list). See also 1980 Cal. Stats., ch. 1340, effective Sept. 30, 1980 (same). The legislature still has never declared what criteria it uses to decide whether a particular government position deserves "peace officer" status.

[5] A judge of the California Court of Appeal once noted:

"No mystery surrounds extension of the traditional definition of peace officer to such an unrecognizable degree by the Legislature. The Legislature must respond to the interests of various groups. Correctional officers, for example, were granted the status of 'peace officers' in order that they may obtain better group insurance benefits. . . . [B]ecause peace officers appear to have enjoyed better benefits in times past, many employee groups, even tangentially associated with the role of peace officers, have

In 1961, without stating any rationale, "in one fell swoop, the legislature passed Government Code Section 1031 which applied the mandatory citizenship requirement to all of the positions on the list." *Id.*, at 986. The legislature apparently made no attempt to include on the "peace officer" list all positions for which citizenship arguably might be relevant or to exclude all positions for which it plainly would be irrelevant. Nine years after § 1031(a) was enacted, California's own Attorney General stated:

> "It is our opinion that . . . this citizenship requirement can no longer validly be imposed. . . .
>
> "[P]rior to 1961, there was no general requirement of citizenship to be a peace officer. We are aware of no change that occurred that would justify the change at that date. . . . [W]e are of the opinion that the classification is not constitutionally permitted. There does not appear to be a compelling state interest . . . to justify classifying certain peace officers as to alienage." Opinion No. 69–199, 53 Op. Cal. Atty. Gen. 63, 67–68 (1970).

After reviewing this history, the District Court sensibly concluded, not once but twice, that § 1031(a) could not survive the rigorous standard of review mandated by *Sugarman* and its progeny. See *Chavez-Salido* v. *Cabell*, 427 F. Supp., at 169–171; *Chavez-Salido* v. *Cabell*, 490 F. Supp., at 985–986. Noting that the State's own legal counsel had found the statute unsupported by a compelling state interest, the District Court concluded that the California Legislature had never made a reasoned judgment to exclude aliens from each individual "peace officer" position. *Id.*, at 985–987. The District Court then found that, like the provision struck down in *Sugarman*, § 1031(a) "is grossly overbroad and sweeps much too broadly in its proscription of alien employment." 490 F. Supp., at 987.

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persuaded the Legislature to include them within the term 'peace officer.'" *Hetherington* v. *State Personnel Bd.*, 82 Cal. App. 3d 582, 600, 147 Cal. Rptr. 300, 311 (1978) (Reynoso, J., dissenting).

Without even a glance at § 1031(a)'s history, the Court today reverses, reasoning that the District Court improperly "applied a standard of review far stricter than that approved in *Sugarman* and later cases." *Ante*, at 442. The Court reads *Sugarman* to hold that "strict scrutiny is out of place when the restriction [on lawfully resident aliens] primarily serves a political function." *Ante*, at 439. Based on its "casual reading" of the list of "peace officer" positions from which aliens are excluded, the Court then decides that "the unifying character of all categories of peace officers is their law enforcement function." *Ante*, at 443. Conceding that § 1031(a) also bars aliens from jobs that "may have only a tenuous connection to traditional police functions of law enforcement," *ante*, at 443, the Court nevertheless declares that alienage classifications "need not be precise; there need only be a substantial fit" between the classification used and the State's asserted interest. *Ante*, at 442.

The Court's analysis fundamentally distorts *Sugarman*. That decision did not condone a looser standard for review of classifications barring aliens from "political" jobs. In both *Sugarman* and *Nyquist*, the Court recognized that a State may name its political community by exercising its "historical and constitutional powers to define the qualifications of voters or of 'elective or important nonelective' officials 'who participate directly in the formulation, execution, or review of broad public policy.'" *Nyquist* v. *Mauclet*, 432 U. S., at 11 (footnote omitted), quoting from *Sugarman*, 413 U. S., at 647. At the same time, however, the Court warned that "in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose." *Id.*, at 643.

While the subsequent decisions in *Foley* v. *Connelie*, 435 U. S. 291 (1978), and *Ambach* v. *Norwick*, 441 U. S. 68 (1979), have explored the boundaries of a State's power to define its political community, those cases have not altered this

stringent standard of review. *Foley* tempered the declaration that a State may entrust "its most important policy responsibilities" to its citizens with the caveat that a State may not "accomplish this end with a citizenship restriction that 'sweeps indiscriminately,' . . . without regard to the differences in the positions involved." 435 U. S., at 296 and 297, n. 5, citing *Sugarman*, 413 U. S., at 643. Similarly, *Ambach* declared that judicial tolerance of citizenship requirements for essential public offices "is an exception to the general standard applicable to classifications based on alienage." 441 U. S., at 75.

Under the *Sugarman* standard, a state statute that bars aliens from political positions lying squarely within the political community nevertheless violates the Equal Protection Clause if it excludes aliens from other public jobs in an unthinking or haphazard manner. The statutes at issue here represent just such an unthinking and haphazard exercise of state power. The District Court found, and the Court does not deny, that some of the more than 70 "peace officer" positions from which aliens have been barred "cannot be considered members of the political community no matter how liberally that category is viewed." 490 F. Supp., at 987. At the same time, California has long permitted aliens to teach in public schools, to be employed on public works, and to serve in most state, city, and county employment positions—all positions arguably within the political community.[6]

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[6] See *Purdy & Fitzpatrick* v. *State*, 71 Cal. 2d 566, 456 P. 2d 645 (1969) (invalidating citizenship requirement for employment on public works); 1970 Cal. Stats., ch. 653, p. 1277, § 1, repealing Art. 2, ch. 2, Pt. 7, Div. 2, Cal. Lab. Code Ann. § 1940 (West 1955) (former citizenship requirement for employment in any department of the State or of any county or city). See generally Comment, The California Exclusion of Permanent Resident Aliens from Appointive Public Office, 11 C. W. L. R. 117, 126–131 (1974) (listing California governmental positions from which permanent resident aliens have and have not been excluded).

Thus, exactly like the statute struck down in *Sugarman*, California's statutory exclusion of aliens is fatally overinclusive and underinclusive. It bars aliens from employment in numerous public positions where the State's proffered justification has little, if any, relevance. At the same time, it allows aliens to fill other positions that would seem naturally to fall within the State's asserted purpose. Cf. *Sugarman*, 413 U. S., at 642. "Our standard of review of statutes that treat aliens differently from citizens requires a greater degree of precision." *Ibid.*

Nor can the Court reconcile its new notion of a "substantial fit" with the stringent standard of review the Court long has applied to alienage classifications. Every time the State requires citizenship for a single "peace officer" position, it excludes permanent resident aliens from hundreds or even thousands of public jobs. The Court's novel standard of review condones a legislative classification that excludes aliens from more than 70 public occupations although citizenship cannot be even rationally required for a substantial number of them.[7] The fact that many of those positions may involve law enforcement cannot justify barring noncitizens from any of the positions that plainly do not. Today's decision thus defies the Court's earlier holdings that the States may not exclude aliens from any "harmless and useful occupation" for which citizenship cannot rationally be required. *Yick Wo* v. *Hopkins*, 118 U. S., at 374; *Truax* v. *Raich*, 239 U. S., at 41.

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[7]The Court cannot seriously argue, for example, that the positions of Dental Board inspector, messenger in the State Treasurer's office, Parks and Recreations Department employee, and volunteer fire warden represent "important nonelective positions," see *Sugarman* v. *Dougall*, 413 U. S. 634, 647 (1973), of the type the States historically or constitutionally have reserved for their citizens. Yet even after the legislature's latest amendments, all remain "peace officer" positions from which aliens are excluded by § 1031(a).

II

While *Sugarman* unambiguously proscribed blanket exclusion of aliens from state jobs, its dictum acknowledged a State's power to bar noncitizens as a class from a narrowly circumscribed range of important nonelective posts involving direct participation "in the formulation, execution, or review of broad public policy." 413 U. S., at 647. Under *Sugarman*'s exception, States may reserve certain public offices for their citizens if those offices "perform functions that go to the heart of representative government." *Ibid.*

As originally understood, the *Sugarman* exception was exceedingly narrow. Less demanding scrutiny was deemed appropriate only for statutes deriving from "a State's historical power to exclude aliens from participation in its democratic political institutions" or its "constitutional responsibility for the establishment and operation of its own government." *Id.*, at 648. Long before *Sugarman*, the Court warned that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits," *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 420 (1948). *In re Griffiths*, 413 U. S. 717 (1973), decided the same day as *Sugarman*, further emphasized the "narrowness of the *[Sugarman]* exception" by asserting that States could not reserve for their citizens every "vital public and political role." *Nyquist* v. *Mauclet*, 432 U. S., at 11, citing *In re Griffiths*, 413 U. S., at 729.

Sugarman's holding made clear that a State's power to exclude resident aliens from public occupations that entail only "execution . . . of broad public policy" is limited. *Sugarman*, 413 U. S., at 647. *Foley* v. *Connelie*, 435 U. S. 291 (1978), and *Ambach* v. *Norwick*, 441 U. S. 68 (1979), then clarified that public jobs involving execution, but not formulation or review, of executive and judicial policy will meet *Sugarman*'s exception if they constitute "one of the basic

functions of government" and "fulfil[l] a most fundamental obligation of government to its constituency." *Foley*, 435 U. S., at 297.

Even accepting the judgments in *Foley* and *Ambach* as binding, I cannot embrace the Court's unsupported assertion that "*Foley* and *Ambach* did not describe the outer limits of permissible citizenship requirements." *Ante*, at 444. From the Court's analysis in *Foley* and *Ambach*, one must conclude that a State may not invoke *Sugarman*'s narrow exception without making a substantial showing.[8]

I read *Foley* and *Ambach* to require the State to show that it has historically reserved a particular executive position for its citizens as a matter of its "constitutional prerogativ[e]." *Sugarman*, 413 U. S., at 648. Furthermore, the State must demonstrate that the public employee in that position exercises plenary coercive authority and control over a substantial portion of the citizen population. The public employee must exercise this authority over his clientele without intervening judicial or executive supervision. Even then, the State must prove that citizenship "'bears some rational relationship to the special demands of the particular position.'" *Id.*, at 647, quoting *Dougall* v. *Sugarman*, 339 F. Supp. 906, 911 (SDNY 1971) (Lumbard, J., concurring).

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[8] In *Foley* v. *Connelie*, the Court held that the State may require policemen to be citizens because they are "clothed with" what are described as "plenary discretionary powers." 435 U. S., at 297–298. Policemen exercise those powers "over people generally" as part of their "pervasive" presence in modern society. *Id.*, at 297–299. Because policemen often act "without prior judicial authority," they require a grant of "prophylactic authority" from the State. *Id.*, at 298. Exercise of that authority demands a "very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals." *Ibid.*

Ambach v. *Norwick* held that a State may bar aliens who have not declared their intent to become citizens from teaching in public schools because teachers perform a similarly significant "governmental function." Schoolteachers, *Ambach* noted, possess a high "degree of responsibility

Without such a rigorous test, *Sugarman*'s exception swallows *Sugarman*'s rule. Yet the Court does not apply such a rigorous test today. Instead, it "look[s] to the importance of the [governmental] function as a factor giving substance to the concept of democratic self-government." *Ante*, at 441, n. 7. Applying this nebulous standard, the Court then concludes that Los Angeles County probation officers perform three "important sovereign functions of the political community." *Ante*, at 445. Yet on inspection, not one of those functions justifies excluding all permanent resident aliens from the deputy probation officer position.

First, the Court declares that probation officers "partake of the sovereign's power to exercise coercive force over the individual." *Ibid.* Yet the Court concedes that "the range of individuals over whom probation officers exercise supervisory authority is limited." *Ibid.* Even over those individuals, a probation officer's coercive powers are carefully conditioned by statute. Probation officers cannot carry guns. See 490 F. Supp., at 985, n. 2. They may arrest only those probationers under their jurisdiction, and even then only for the purpose of bringing them before the court for a determination whether they should be held or released. Cal. Penal Code Ann. § 1203.2 (West Supp. 1981). State statutes authorize probation officers to detain juveniles only in emergencies and, even then, for only brief periods. Cal. Welf. & Inst. Code Ann. §§ 309, 313, 315 (West Supp. 1981).

The Court claims that § 1031(a) "limit[s] the exercise of the sovereign's coercive police powers over the members of the community to citizens." *Ante*, at 444. Yet other statutes

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and discretion" which they exercise to fulfill the government's basic obligation to provide public education. 441 U. S., at 75. Furthermore, teachers have "direct, day-to-day contact" with their students, exercise unsupervised discretion over them, act as role models, and influence their students' attitudes about the government and the political process. *Id.*, at 78–79.

belie that assertion. The State gives the power of arrest to a number of public employees who are not peace officers, but does not require that those employees be citizens. See Cal. Penal Code Ann. § 830.7 (West Supp. 1981) (describing "[p]ersons not peace officers but having powers of arrest"). Moreover, California authorizes any "private person," *including permanent resident aliens*, to arrest others who have actually committed felonies or who have committed or attempted public offenses in their presence. §§ 834, 837. The Court's hollow assertion that the legislature has reserved its sovereign coercive powers for its citizens ignores the reality that the State has already bestowed some of those powers on all private persons, including aliens.

Second, the Court asserts that probation officers necessarily have "discretion that . . . must be exercised, in the first instance, without direct supervision." *Ante*, at 446. Yet to say this is to say very little. Almost everyone who works in the government bureaucracy exercises *some* discretion that is unsupervised in the first instance. The Court itself observes that probation officers have discretion primarily to investigate, to supervise, to evaluate, and to recommend. *Ante*, at 446–447. Their primary duties are preparing presentence reports, supervising probationers, and recommending sentences and probationary terms. *Chavez-Salido* v. *Cabell*, 427 F. Supp., at 171.

While I do not denigrate these functions, neither can I equate them with the discretionary duties of policemen, judges, and jurors. Unlike policemen, probation officers are not "clothed with authority to exercise an almost infinite variety of discretionary powers." *Foley* v. *Connelie*, 435 U. S., at 297.[9] Unlike jurors who deliver final verdicts and

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[9] Nor can the Court argue by analogy to *Ambach* v. *Norwick*, 441 U. S. 68 (1979), that probation officers, like teachers, influence their probationers' "attitudes . . . toward government, the political process, and a citizen's

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judges who impose final sentences, the decisions of probation officers are always advisory to and supervised by judicial officers. California probation officers cannot by themselves declare revocation of probation. Cal. Penal Code Ann. § 1203.2 (West Supp. 1981). Furthermore, the investigative and reporting duties of a probation officer are extensively regulated by statute. §§ 1203.2–1203.12. The fact that probation officers play an integral role in the criminal justice system does not separate them from prison guards, bailiffs, court clerks, and the myriad other functionaries who execute a State's judicial policy.

More significantly, California's inflexible exclusion of aliens from deputy probation officer positions is inconsistent with its tolerance of aliens in other roles integral to the criminal justice system. California counties apparently may appoint aliens to the positions of *chief* juvenile probation officer or *chief* adult probation officer "if . . . the best interests of the county will be served." Cal. Gov't Code Ann. § 24001 (West Supp. 1981). Furthermore, even before *In re Griffiths*, 413 U. S. 717 (1973), the California Supreme Court had held that lawfully resident aliens may not be barred constitutionally from the practice of law. *Raffaelli* v. *Committee of Bar Examiners*, 7 Cal. 3d 288, 496 P. 2d 1264 (1972). Nor are resident aliens barred from becoming California Superior Court judges or Supreme Court justices.[10]

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social responsibilities." *Id.*, at 79. Such an assertion would ignore the reality of a modern probation officer's life.

In 1973, the average federal probation officer supervised nearly 100 offenders. Federal Judicial Center, Probation Time Study 3 (Feb. 26, 1973). Each offender under supervision was accorded between six and eight hours of supervision from his probation officer in a year, or seven to nine minutes per week. *Ibid.* It blinks reality to suggest that a probation officer subject to these pressures has either the time or the inclination to give his probationers lessons in civics.

[10] Until 1966, Cal. Gov't Code Ann. §§ 69500, 68804 required that Superior Court judges and Supreme Court justices be citizens. In 1967, however, those provisions were repealed. 1967 Cal. Stats., ch. 17, pp. 841,

Thus, a criminal defendant in California may be represented at trial and on appeal by an alien attorney, have his case tried before an alien judge and appealed to an alien justice, and then have his probation supervised by a county probation department headed by an alien. I find constitutionally absurd the Court's suggestion that the same defendant cannot be entrusted to the supervised discretion of a resident alien deputy probation officer. In the Court's own words, a statutory scheme that tolerates such a result is sufficiently "haphazard as to belie the State's claim that it is only attempting to ensure that an important function of government be in the hands of those having the 'fundamental legal bond of citizenship.'" *Ante*, at 442.

The Court's third and final claim is that a probation officer acts as an actual and symbolic "extension" of the judiciary's authority to set conditions of probation and the executive's authority to coerce obedience to those conditions. *Ante*, at 447. Yet, by so saying, the Court simply concedes that the ultimate authority for a probation officer's acts lies elsewhere. In *Griffiths*, we held that aliens are not constitutionally disabled from serving as "officers of the court." 413 U. S., at 722–727. Given the size of the State's judicial and executive bureaucracy, little would be left of *Sugarman*'s holding if a State could invoke the *Sugarman* exception to exclude probation officers from any position which "extended" judicial or executive authority.[11]

Nor am I convinced by the Court's claim that a probation officer personifies the State's sovereign powers in the eyes of

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845, §§ 61, 87. As a result, the only remaining restriction on becoming a judge in California is membership in the state bar for a certain number of years. Cal. Const., Art. VI, § 15. After the California Supreme Court's decision in *Raffaelli*, aliens became eligible for the bar and, hence, to become judges.

[11] The Court concedes as much when it notes that "almost every governmental official can be understood as participating in the execution of broad public policies." *Ante*, at 441, n. 7.

probationers and the larger community. This justification knows no limit. Surely a taxpayer feels the State's sovereign power when the local tax collector comes to his door; the larger community recognizes the sovereign power of the government when local firefighters put out a fire. The State could not also demand citizenship for those jobs, however, without thoroughly eviscerating *Sugarman*. Nor does the Court deny that the sight of foreign-born individuals not merely following, but encouraging others to follow, our laws is an equally powerful symbol of respect for our society's social norms.

In the end, the State has identified no characteristic of permanent resident aliens *as a class* which disables them from performing the job of deputy probation officer. Cf. *Foley* v. *Connelie*, 435 U. S., at 308 (STEVENS, J., dissenting). The State does not dispute that these appellees possess the qualifications and educational background to perform the duties that job entails. See nn. 1 and 2, *supra*. Indeed, the State advances no rational reason why these appellees, native Spanish-speakers with graduate academic degrees, are not superbly qualified to act as probation officers for Spanish-speaking probationers, some of whom themselves may not be citizens. Cf. *Ambach* v. *Norwick*, 441 U. S., at 84, 87–88 (dissenting opinion).

The State cannot challenge the appellees' lack of familiarity with local laws or rules. Such a consideration might disqualify nonresident citizens, but not permanent resident aliens who have lived in California for much of their lives. Nor can the State presume that aliens as a class would be less loyal to the State. The Court's rulings in *In re Griffiths*, 413 U. S., at 726, n. 18, and *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 111, n. 43 (1976), clearly state that one need not be a citizen in order to swear in good conscience to support the Constitution. When these appellees applied for their jobs, they expressed their willingness to take such oaths. One later declared his intent to become, and then became, a citizen. See

490 F.Supp., at 985, n. 2. Finally, the State cannot claim that by enacting § 1031(a), it seeks to encourage aliens to become citizens. That objective is an exclusively federal interest. *Nyquist* v. *Mauclet*, 432 U. S., at 10–11.

I only can conclude that California's exclusion of these appellees from the position of deputy probation officer stems solely from state parochialism and hostility toward foreigners who have come to this country lawfully. I find it ironic that the Court invokes the principle of democratic self-government to exclude from the law enforcement process individuals who have not only resided here lawfully, but who now desire merely to help the State enforce its laws. Section 1031(a) violates appellees' rights to equal treatment and an individualized determination of fitness.

I would affirm the District Court's ruling that § 1031(a) is unconstitutional on its face and as applied.

VALLEY FORGE CHRISTIAN COLLEGE *v.* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80–327. Argued November 4, 1981—Decided January 12, 1982

Pursuant to its authority under the Property Clause, Congress enacted the Federal Property and Administrative Services Act of 1949 to provide an economical and efficient system for the disposal of surplus Federal Government property. Under the statute, property that has outlived its usefulness to the Government is declared "surplus" and may be transferred to private or other public entities. The Act authorizes the Secretary of Health, Education, and Welfare (HEW) (now the Secretary of Education) to assume responsibility for disposing of surplus real property for educational use, and he may sell such property to nonprofit, tax-exempt educational institutions for consideration that takes into account any benefit which has accrued or may accrue to the United States from the transferee's use of the property. Property formerly used as a military hospital was declared to be "surplus property" under the Act and was conveyed by the Department of HEW to petitioner church-related college. The appraised value of the property, $577,500, was discounted by the Secretary of HEW's computation of a 100% public benefit allowance, thus permitting petitioner to acquire the property without making any financial payment. Respondents, an organization dedicated to the separation of church and State and several of its employees, brought suit in Federal District Court, challenging the conveyance on the ground that it violated the Establishment Clause of the First Amendment, and alleging that each member of respondent organization "would be deprived of the fair and constitutional use of his (her) tax dollars." The District Court dismissed the complaint on the ground that respondents lacked standing to sue as taxpayers under *Flast* v. *Cohen*, 392 U. S. 83, and failed to allege any actual injury beyond a generalized grievance common to all taxpayers. The Court of Appeals reversed, holding that although respondents lacked standing as taxpayers to challenge the conveyance, they had standing merely as "citizens," claiming " 'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion,' " which standing was sufficient to satisfy the "case or controversy" requirement of Art. III.

Held: Respondents do not have standing, either in their capacity as taxpayers or as citizens, to challenge the conveyance in question. Pp. 471–490.

(a) The exercise of judicial power under Art. III is restricted to litigants who can show "injury in fact" resulting from the action that they seek to have the court adjudicate. Pp. 471–476.

(b) Respondents are without standing to sue as taxpayers, because the source of their complaint is not a congressional action but a decision by HEW to transfer a parcel of federal property and because the conveyance in question was not an exercise of Congress' authority conferred by the Taxing and Spending Clause but by the Property Clause. Cf. *Flast* v. *Cohen*, *supra*. Pp. 476–482.

(c) Nor have respondents sufficiently alleged any other basis for standing to bring suit. Although they claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not injury sufficient to confer standing under Art. III. While respondents are firmly committed to the constitutional principle of separation of church and State, standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. Pp. 482–487.

(d) Enforcement of the Establishment Clause does not justify special exceptions from the standing requirements of Art. III. There is no place in our constitutional scheme for the philosophy that the business of the federal courts is correcting constitutional errors and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. And such philosophy does not become more palatable when the underlying merits concern the Establishment Clause. Pp. 488–490.

619 F. 2d 252, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 490. STEVENS, J., filed a dissenting opinion, *post*, p. 513.

C. Clark Hodgson, Jr., argued the cause and filed a brief for petitioner.

Solicitor General Lee argued the cause for the federal parties as respondents under this Court's Rule 19.6 in support of

petitioner. With him on the briefs were former *Solicitor General McCree, Deputy Solicitor General Geller, Deputy Solicitor General Shapiro, Leonard Schaitman,* and *Bruce Bagni.*

Lee Boothby argued the cause for respondents. With him on the brief was *Robert W. Nixon.**

JUSTICE REHNQUIST delivered the opinion of the Court.

I

Article IV, § 3, cl. 2, of the Constitution vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." Shortly after the termination of hostilities in the Second World War, Congress enacted the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended, 40 U. S. C. § 471 *et seq.* (1976 ed. and Supp. III). The Act was designed, in part, to provide "an economical and efficient system for . . . the disposal of surplus property." 63 Stat. 378, 40 U. S. C. § 471. In furtherance of this policy, federal agencies are directed to maintain adequate inventories of the property under their control and to identify excess property for transfer to other agencies able to use it. See 63 Stat. 384, 40 U. S. C. §§ 483(b), (c).[1] Property that has outlived its usefulness to the Federal Government is declared "surplus"[2] and may be transferred to pri-

*Briefs of *amici curiae* urging affirmance were filed by *Nathan Z. Dershowitz* and *Marc D. Stern* for the American Jewish Congress et al.; and by *Leo Pfeffer* for the National Coalition for Public Education and Religious Liberty et al.

[1] The Act defines "excess property" as "property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities." 63 Stat. 378, 40 U. S. C. § 472(e).

[2] The Act defines "surplus property" as "any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator [of General Services]." 63 Stat. 379, 40 U. S. C. § 472(g).

vate or other public entities. See generally 63 Stat. 385, as amended, 40 U. S. C. § 484.

The Act authorizes the Secretary of Health, Education, and Welfare (now the Secretary of Education[3]) to assume responsibility for disposing of surplus real property "for school, classroom, or other educational use." 63 Stat. 387, as amended, 40 U. S. C. § 484(k)(1). Subject to the disapproval of the Administrator of General Services, the Secretary may sell or lease the property to nonprofit, tax-exempt educational institutions for consideration that takes into account "any benefit which has accrued or may accrue to the United States" from the transferee's use of the property. 63 Stat. 387, 40 U. S. C. §§ 484(k)(1)(A), (C).[4] By regulation, the Secretary has provided for the computation of a "public benefit allowance," which discounts the transfer price of the property "on the basis of benefits to the United States from the use of such property for educational purposes." 34 CFR § 12.9(a) (1980).[5]

The property which spawned this litigation was acquired by the Department of the Army in 1942, as part of a larger tract of approximately 181 acres of land northwest of Philadelphia. The Army built on that land the Valley Forge General Hospital, and for 30 years thereafter, that hospital provided medical care for members of the Armed Forces. In April 1973, as part of a plan to reduce the number of military

[3] See 20 U. S. C. §§ 3411, 3441(a)(2)(P) (1976 ed., Supp. III).

[4] The property is to "be awarded to the applicant having a program of utilization which provides, in the opinion of the Department [of Education], the greatest public benefit." 34 CFR § 12.5 (1980). Applicants must be willing and able to assume immediate responsibility for the property and must demonstrate the financial capacity to implement the approved program of educational use. § 12.8(b).

[5] In calculating the public benefit allowance, the Secretary considers factors such as the applicant's educational accreditation, sponsorship of public service training, plans to introduce new instructional programs, commitment to student health and welfare, research, and service to the handicapped. 34 CFR pt. 12, Exh. A (1980).

installations in the United States, the Secretary of Defense proposed to close the hospital, and the General Services Administration declared it to be "surplus property."

The Department of Health, Education, and Welfare (HEW) eventually assumed responsibility for disposing of portions of the property, and in August 1976, it conveyed a 77-acre tract to petitioner, the Valley Forge Christian College.[6] The appraised value of the property at the time of conveyance was $577,500.[7] This appraised value was discounted, however, by the Secretary's computation of a 100% public benefit allowance, which permitted petitioner to acquire the property without making any financial payment for it. The deed from HEW conveyed the land in fee simple with certain conditions subsequent, which required petitioner to use the property for 30 years solely for the educational purposes described in petitioner's application. In that description, petitioner stated its intention to conduct "a program of education . . . meeting the accrediting standards of the State of Pennsylvania, The American Association of Bible Colleges, the Division of Education of the General Council of the Assemblies of God and the Veterans Administration."

Petitioner is a nonprofit educational institution operating under the supervision of a religious order known as the Assemblies of God. By its own description, petitioner's purpose is "to offer systematic training on the collegiate level to men and women for Christian service as either ministers or laymen." App. 34. Its degree programs reflect this orientation by providing courses of study "to train leaders for church related ministries." *Id.*, at 102. Faculty members

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[6] The remaining property was conveyed to local school districts for educational purposes or set aside for park and recreational use. At the time of the conveyance, petitioner was known as the Northeast Bible College.

[7] The appraiser placed no value on the buildings and fixtures situated on the tract. The buildings had been constructed for use as an Army hospital and, in his view, the expense necessary to render them useful for other purposes would have offset the value of such an endeavor.

must "have been baptized in the Holy Spirit and be living consistent Christian lives," *id.*, at 37, and all members of the college administration must be affiliated with the Assemblies of God, *id.*, at 36. In its application for the 77-acre tract, petitioner represented that, if it obtained the property, it would make "additions to its offerings in the arts and humanities," and would strengthen its "psychology" and "counselling" courses to provide services in inner-city areas.

In September 1976, respondents Americans United for Separation of Church and State, Inc. (Americans United), and four of its employees, learned of the conveyance through a news release. Two months later, they brought suit in the United States District Court for the District of Columbia, later transferred to the Eastern District of Pennsylvania, to challenge the conveyance on the ground that it violated the Establishment Clause of the First Amendment.[8] See *id.*, at 10. In its amended complaint, Americans United described itself as a nonprofit organization composed of 90,000 "taxpayer members." The complaint asserted that each member "would be deprived of the fair and constitutional use of his (her) tax dollar for constitutional purposes in violation of his (her) rights under the First Amendment of the United States Constitution." *Ibid.* Respondents sought a declaration that the conveyance was null and void, and an order compelling petitioner to transfer the property back to the United States. *Id.*, at 12.

On petitioner's motion, the District Court granted summary judgment and dismissed the complaint. App. to Pet. for Cert. A42. The court found that respondents lacked standing to sue as taxpayers under *Flast* v. *Cohen*, 392 U. S. 83 (1968), and had "failed to allege that they have suffered any actual or concrete injury beyond a generalized grievance common to all taxpayers." App. to Pet. for Cert. A43.

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[8] "Congress shall make no law respecting an establishment of religion . . . ."

Respondents appealed to the Court of Appeals for the Third Circuit, which reversed the judgment of the District Court by a divided vote. *Americans United* v. *U. S. Dept. of HEW*, 619 F. 2d 252 (1980). All members of the court agreed that respondents lacked standing as taxpayers to challenge the conveyance under *Flast* v. *Cohen*, *supra*, since that case extended standing to taxpayers *qua* taxpayers only to challenge congressional exercises of the power to tax and spend conferred by Art. I, §8, of the Constitution, and this conveyance was authorized by legislation enacted under the authority of the Property Clause, Art. IV, §3, cl. 2. Notwithstanding this significant factual difference from *Flast*, the majority of the Court of Appeals found that respondents had standing merely as "citizens," claiming "'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion.'" 619 F. 2d, at 261. In the majority's view, this "citizen standing" was sufficient to satisfy the "case or controversy" requirement of Art. III. One judge, perhaps sensing the doctrinal difficulties with the majority's extension of standing, wrote separately, expressing his view that standing was necessary to satisfy "the need for an available plaintiff," without whom "the Establishment Clause would be rendered virtually unenforceable" by the judiciary. *Id.*, at 267, 268. The dissenting judge expressed the view that respondents' allegations constituted a "generalized grievance . . . too abstract to satisfy the injury in fact component of standing." *Id.*, at 269. He therefore concluded that their standing to contest the transfer was barred by this Court's decisions in *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208 (1974), and *United States* v. *Richardson*, 418 U. S. 166 (1974). 619 F. 2d, at 270–271.

Because of the unusually broad and novel view of standing to litigate a substantive question in the federal courts adopted by the Court of Appeals, we granted certiorari, 450 U. S. 909 (1981), and we now reverse.

II

Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity "to adjudge the legal rights of litigants in actual controversies." *Liverpool S.S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process. The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U. S. 339, 345 (1892). Otherwise, the power "is not judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States." *United States* v. *Ferreira*, 13 How. 40, 48 (1852).

As an incident to the elaboration of this bedrock requirement, this Court has always required that a litigant have "standing" to challenge the action sought to be adjudicated in the lawsuit. The term "standing" subsumes a blend of constitutional requirements and prudential considerations, see *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975), and it has not always been clear in the opinions of this Court whether particular features of the "standing" requirement have been required by Art. III *ex proprio vigore*, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution. See *Flast* v. *Cohen*, *supra*, at 97.

A recent line of decisions, however, has resolved that ambiguity, at least to the following extent: at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 38, 41 (1976).[9] In this manner does Art. III limit the federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast* v. *Cohen*, 392 U. S., at 97.

The requirement of "actual injury redressable by the court," *Simon*, *supra*, at 39, serves several of the "implicit policies embodied in Article III," *Flast*, *supra*, at 96. It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. The "standing" requirement serves other purposes. Because it assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.

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[9] See *Watt* v. *Energy Action Educational Foundation*, *ante*, at 161; *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 261, 262 (1977); *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208, 218, 220–221 (1974); *United States* v. *Richardson*, 418 U. S. 166, 179–180 (1974); *O'Shea* v. *Littleton*, 414 U. S. 488, 493 (1974); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617–618 (1973).

The Art. III aspect of standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order. The federal courts have abjured appeals to their authority which would convert the judicial process into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973). Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of "standing" would be quite unnecessary. But the "cases and controversies" language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums. As we said in *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1972):

> "The requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."

The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to litigants who can show "injury in fact" resulting from the action which they seek to have the court adjudicate.

The exercise of the judicial power also affects relationships between the coequal arms of the National Government. The effect is, of course, most vivid when a federal court declares unconstitutional an act of the Legislative or Executive Branch. While the exercise of that "ultimate and supreme function," *Chicago & Grand Trunk R. Co.* v. *Wellman*, *supra*, at 345, is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing that role. While the propriety of such action by a federal court has been recognized since

Marbury v. *Madison*, 1 Cranch 137 (1803), it has been recognized as a tool of last resort on the part of the federal judiciary throughout its nearly 200 years of existence:

> "[R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches." *United States* v. *Richardson*, 418 U. S., at 188 (POWELL, J., concurring).

Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury. Thus, this Court has "refrain[ed] from passing upon the constitutionality of an act [of the representative branches] unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." *Blair* v. *United States*, 250 U. S. 273, 279 (1919). The importance of this precondition should not be underestimated as a means of "defin[ing] the role assigned to the judiciary in a tripartite allocation of power." *Flast* v. *Cohen*, *supra*, at 95.

Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U. S., at 499.[10] In addition, even when the plaintiff has al-

[10] See *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 100 (1979); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, *supra*, at 80; *Singleton* v. *Wulff*, 428 U. S. 106, 113–114 (1976).

leged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches. *Id.*, at 499–500.[11] Finally, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Orgs.* v. *Camp*, 397 U. S. 150, 153 (1970).[12]

Merely to articulate these principles is to demonstrate their close relationship to the policies reflected in the Art. III requirement of actual or threatened injury amenable to judicial remedy. But neither the counsels of prudence nor the policies implicit in the "case or controversy" requirement should be mistaken for the rigorous Art. III requirements themselves. Satisfaction of the former cannot substitute for a demonstration of "'distinct and palpable injury' . . . that is likely to be redressed if the requested relief is granted." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., at 100 (quoting *Warth* v. *Seldin*, *supra*, at 501). That requirement states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called "prudential" considerations.

We need not mince words when we say that the concept of "Art. III standing" has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it, nor when we say that this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition. But of one thing we may be sure: Those who do not possess Art. III standing may

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[11] See *Gladstone, Realtors* v. *Village of Bellwood*, *supra*, at 100; *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S., at 80.

[12] See *Gladstone, Realtors* v. *Village of Bellwood*, *supra*, at 100, n. 6; *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 39, n. 19 (1976).

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not litigate as suitors in the courts of the United States.[13] Article III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the "merits" of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787, a charter which created a general government, provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit its authority with respect to both States and individuals.

III

The injury alleged by respondents in their amended complaint is the "depriv[ation] of the fair and constitutional use of [their] tax dollar." App. 10.[14] As a result, our discussion

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[13] JUSTICE BRENNAN's dissent takes us to task for "tend[ing] merely to obfuscate, rather than inform, our understanding of the meaning of rights under the law." *Post*, at 490. Were this Court constituted to operate a national classroom on "the meaning of rights" for the benefit of interested litigants, this criticism would carry weight. The teaching of Art. III, however, is that constitutional adjudication is available only on terms prescribed by the Constitution, among which is the requirement of a plaintiff with standing to sue. The dissent asserts that this requirement "overrides no other provision of the Constitution," *post*, at 493, but just as surely the Art. III power of the federal courts does not wax and wane in harmony with a litigant's desire for a "hospitable forum," *post*, at 494. Article III obligates a federal court to act only when it is assured of the power to do so, that is, when it is called upon to resolve an actual case or controversy. Then, and only then, may it turn its attention to other constitutional provisions and presume to provide a forum for the adjudication of rights. See *Ashwander* v. *TVA*, 297 U. S. 288, 345 (1936) (Brandeis, J., concurring).

[14] Respondent Americans United has alleged no injury to itself as an organization, distinct from injury to its taxpayer members. As a result, its claim to standing can be no different from those of the members it seeks to represent. The question is whether "its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members

must begin with *Frothingham* v. *Mellon*, 262 U. S. 447 (1923) (decided with *Massachusetts* v. *Mellon*). In that action a taxpayer brought suit challenging the constitutionality of the Maternity Act of 1921, which provided federal funding to the States for the purpose of improving maternal and infant health. The injury she alleged consisted of the burden of taxation in support of an unconstitutional regime, which she characterized as a deprivation of property without due process. "Looking through forms of words to the substance of [the] complaint," the Court concluded that the only "injury" was the fact "that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional." *Id.*, at 488. Any tangible effect of the challenged statute on the plaintiff's tax burden was "remote, fluctuating and uncertain." *Id.*, at 487. In rejecting this as a cognizable injury sufficient to establish standing, the Court admonished:

> "The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. . . . Here the parties plaintiff have no such case." *Id.*, at 488.

Following the decision in *Frothingham*, the Court confirmed that the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer. In *Doremus* v. *Board of Education*, 342 U. S. 429 (1952), plaintiffs brought suit as citizens and taxpayers, claiming that a New Jersey law which authorized public school teachers in the classroom to read passages from

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themselves brought suit." *Warth* v. *Seldin*, 422 U. S., at 511. See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*, at 40; *Sierra Club* v. *Morton*, 405 U. S. 727, 739–741 (1972).

the Bible violated the Establishment Clause of the First Amendment. The Court dismissed the appeal for lack of standing:

> "This Court has held that the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure. . . . Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'" *Id.*, at 433–434 (quoting *Frothingham* v. *Mellon*, *supra*, at 488) (citations omitted).

In short, the Court found that plaintiffs' grievance was "not a direct dollars-and-cents injury but is a religious difference." 342 U. S., at 434. A case or controversy did not exist, even though the "clash of interests [was] real and . . . strong." *Id.*, at 436 (Douglas, J., dissenting).

The Court again visited the problem of taxpayer standing in *Flast* v. *Cohen*, 392 U. S. 83 (1968). The taxpayer plaintiffs in *Flast* sought to enjoin the expenditure of federal funds under the Elementary and Secondary Education Act of 1965, which they alleged were being used to support religious schools in violation of the Establishment Clause. The Court developed a two-part test to determine whether the plaintiffs had standing to sue. First, because a taxpayer alleges injury only by virtue of his liability for taxes, the Court held that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitu-

tion." *Id.*, at 102. Second, the Court required the taxpayer to "show that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, §8." *Id.*, at 102–103.

The plaintiffs in *Flast* satisfied this test because "[t]heir constitutional challenge [was] made to an exercise by Congress of its power under Art. I, §8, to spend for the general welfare," *id.*, at 103, and because the Establishment Clause, on which plaintiffs' complaint rested, "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, §8," *id.*, at 104. The Court distinguished *Frothingham* v. *Mellon*, *supra*, on the ground that Mrs. Frothingham had relied, not on a specific limitation on the power to tax and spend, but on a more general claim based on the Due Process Clause. 392 U. S., at 105. Thus, the Court reaffirmed that the "case or controversy" aspect of standing is unsatisfied "where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Id.*, at 106.

Unlike the plaintiffs in *Flast*, respondents fail the first prong of the test for taxpayer standing. Their claim is deficient in two respects. First, the source of their complaint is not a congressional action, but a decision by HEW to transfer a parcel of federal property.[15] *Flast* limited taxpayer standing to challenges directed "only [at] exercises of congressional power." *Id.*, at 102. See *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S., at 228 (denying standing because the taxpayer plaintiffs "did not challenge an enactment under Art. I, §8, but rather the action of the Executive Branch").

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[15] Respondents do not challenge the constitutionality of the Federal Property and Administrative Services Act itself, but rather a particular Executive Branch action arguably authorized by the Act.

Second, and perhaps redundantly, the property transfer about which respondents complain was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8. The authorizing legislation, the Federal Property and Administrative Services Act of 1949, was an evident exercise of Congress' power under the Property Clause, Art. IV, § 3, cl. 2.[16] Respondents do not dispute this conclusion, see Brief for Respondents Americans United et al. 10, and it is decisive of any claim of taxpayer standing under the *Flast* precedent.[17]

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[16] The Act was designed "to simplify the procurement, utilization, and disposal of Government property" in order to achieve an "efficient, businesslike system of property management." S. Rep. No. 475, 81st Cong., 1st Sess., 1 (1949). See H. R. Rep. No. 670, 81st Cong., 1st Sess., 1–2 (1949). Among the central purposes of the Act was the "maximum utilization of property already owned by the Government and minimum purchasing of new property." S. Rep. No. 475, *supra*, at 4. Congress recognized, however, that from time to time certain property would become surplus to the Government, and in particular, property acquired by the military to meet wartime contingencies. Congress provided a means of disposing of this property to meet well-recognized public priorities, including education. See S. Rep. No. 475, *supra*, at 4–5; H. R. Rep. No. 670, *supra*, at 5–6.

[17] Although not necessary to our decision, we note that any connection between the challenged property transfer and respondents' tax burden is at best speculative and at worst nonexistent. Although public funds were expended to establish the Valley Forge General Hospital, the land was acquired and the facilities constructed 30 years prior to the challenged transfer. Respondents do not challenge this expenditure, and we do not immediately perceive how such a challenge might now be raised. Nor do respondents dispute the Government's conclusion that the property has become useless for federal purposes and ought to be disposed of in some productive manner. In fact, respondents' only objection is that the Government did not receive adequate consideration for the transfer, because petitioner's use of the property will not confer a public benefit. See Brief for Respondents Americans United et al. 13. Assuming, *arguendo*, that this proposition is true, an assumption by no means clear, there is no basis for believing that a transfer to a different purchaser would have added to Government receipts. As the Government argues, "the ultimate purchaser would, in all likelihood, have been another non-profit institution or local school district rather than a purchaser for cash." Brief for Federal Respondents 30. Moreover, each year of delay in disposing of the prop-

Any doubt that once might have existed concerning the rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied should have been erased by this Court's recent decisions in *United States* v. *Richardson*, 418 U. S. 166 (1974), and *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*. In *Richardson*, the question was whether the plaintiff had standing as a federal taxpayer to argue that legislation which permitted the Central Intelligence Agency to withhold from the public detailed information about its expenditures violated the Accounts Clause of the Constitution.[18] We rejected plaintiff's claim of standing because "his challenge [was] not addressed to the taxing or spending power, but to the statutes regulating the CIA." 418 U. S., at 175. The "mere recital" of those claims "demonstrate[d] how far he [fell] short of the standing criteria of *Flast* and how neatly he [fell] within the *Frothingham* holding left undisturbed." *Id.*, at 174–175.

The claim in *Schlesinger* was marred by the same deficiency. Plaintiffs in that case argued that the Incompatibility Clause of Art. I[19] prevented certain Members of Congress from holding commissions in the Armed Forces Reserve. We summarily rejected their assertion of standing as taxpayers because they "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status." 418 U. S., at 228 (footnote omitted).

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erty *depleted* the Treasury by the amounts necessary to maintain a facility that had lost its value to the Government. Even if respondents had brought their claim within the outer limits of *Flast*, therefore, they still would have encountered serious difficulty in establishing that they "personally would benefit in a tangible way from the court's intervention." *Warth* v. *Seldin*, 422 U. S., at 508.

[18] U. S. Const., Art. I, § 9, cl. 7 ("[A]nd a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time").

[19] U. S. Const., Art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office").

Respondents, therefore, are plainly without standing to sue as taxpayers. The Court of Appeals apparently reached the same conclusion. It remains to be seen whether respondents have alleged any other basis for standing to bring this suit.

IV

Although the Court of Appeals properly doubted respondents' ability to establish standing solely on the basis of their taxpayer status, it considered their allegations of taxpayer injury to be "essentially an assumed role." 619 F. 2d, at 261.

> "Plaintiffs have no reason to expect, nor perhaps do they care about, any personal tax saving that might result should they prevail. The crux of the interest at stake, the plaintiffs argue, is found in the Establishment Clause, not in the supposed loss of money as such. As a matter of primary identity, therefore, the plaintiffs are not so much taxpayers as separationists . . . ." *Ibid.*

In the court's view, respondents had established standing by virtue of an "'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion.'" *Ibid.* The court distinguished this "injury" from "the question of 'citizen standing' as such." *Id.*, at 262. Although citizens generally could not establish standing simply by claiming an interest in governmental observance of the Constitution, respondents had "set forth instead a particular and concrete injury" to a "personal constitutional right." *Id.*, at 265.

The Court of Appeals was surely correct in recognizing that the Art. III requirements of standing are not satisfied by "the abstract injury in nonobservance of the Constitution asserted by . . . citizens." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S., at 223, n. 13. This Court repeatedly has rejected claims of standing predicated on "'the right, possessed by every citizen, to require that the

Government be administered according to law . . . .' *Fairchild* v. *Hughes*, 258 U. S. 126, 129 [1922]." *Baker* v. *Carr*, 369 U. S. 186, 208 (1962). See *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*, at 216–222; *Laird* v. *Tatum*, 408 U. S. 1 (1972); *Ex parte Levitt*, 302 U. S. 633 (1937). Such claims amount to little more than attempts "to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *Flast* v. *Cohen*, 392 U. S., at 106.

In finding that respondents had alleged something more than "the generalized interest of all citizens in constitutional governance," *Schlesinger*, *supra*, at 217, the Court of Appeals relied on factual differences which we do not think amount to legal distinctions. The court decided that respondents' claim differed from those in *Schlesinger* and *Richardson*, which were predicated, respectively, on the Incompatibility and Accounts Clauses, because "it is at the very least arguable that the Establishment Clause creates in each citizen a 'personal constitutional right' to a government that does not establish religion." 619 F. 2d, at 265 (footnote omitted). The court found it unnecessary to determine whether this "arguable" proposition was correct, since it judged the mere allegation of a legal right sufficient to confer standing.

This reasoning process merely disguises, we think with a rather thin veil, the inconsistency of the court's results with our decisions in *Schlesinger* and *Richardson*. The plaintiffs in those cases plainly asserted a "personal right" to have the Government act in accordance with their views of the Constitution; indeed, we see no barrier to the *assertion* of such claims with respect to any constitutional provision. But assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.

Nor can *Schlesinger* and *Richardson* be distinguished on the ground that the Incompatibility and Accounts Clauses are in some way less "fundamental" than the Establishment Clause. Each establishes a norm of conduct which the Federal Government is bound to honor—to no greater or lesser extent than any other inscribed in the Constitution. To the extent the Court of Appeals relied on a view of standing under which the Art. III burdens diminish as the "importance" of the claim on the merits increases, we reject that notion. The requirement of standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast* v. *Cohen*, *supra*, at 99. Moreover, we know of no principled basis on which to create a hierarchy of constitutional values or a complementary "sliding scale" of standing which might permit respondents to invoke the judicial power of the United States.[20]

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[20] JUSTICE BRENNAN's dissent is premised on a revisionist reading of our precedents which leads to the conclusion that the Art. III requirement of standing is satisfied by any taxpayer who contends "that the Federal Government has exceeded the bounds of the law in allocating its largesse," *post*, at 508. "The concept of taxpayer injury necessarily recognizes the continuing stake of the taxpayer in the disposition of the Treasury to which he has contributed his taxes, and his right to have those funds put to lawful uses." *Post*, at 497–498. On this novel understanding, the dissent reads cases such as *Frothingham* and *Flast* as decisions on the merits of the taxpayers' claims. *Frothingham* is explained as a holding that a taxpayer ordinarily has no legal right to challenge congressional expenditures. *Post*, at 499. The dissent divines from *Flast* the holding that a taxpayer *does* have an enforceable right "to challenge a federal bestowal of largesse" for religious purposes. *Post*, at 509. This right extends to "the Government as a whole, regardless of which branch is at work in a particular instance," *post*, at 511, and regardless of whether the challenged action was an exercise of the spending power, *post*, at 512.

However appealing this reconstruction of precedent may be, it bears little resemblance to the cases on which it purports to rest. *Frothingham* and *Flast* were decisions that plainly turned on *standing*, and just as plainly they rejected any notion that the Art. III requirement of direct injury is satisfied by a taxpayer who contends "that the Federal Government

"The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S., at 227.

The complaint in this case shares a common deficiency with those in *Schlesinger* and *Richardson*. Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in

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has exceeded the bounds of the law in allocating its largesse." *Post*, at 508. Moreover, although the dissent's view may lead to a result satisfying to many in this case, it is not evident how its substitution of "legal interest," *post*, at 499, for "standing" enhances "our understanding of the meaning of rights under law," *post*, at 490. Logically, the dissent must shoulder the burden of explaining why taxpayers with standing have no "legal interest" in congressional expenditures except when it is possible to allege a violation of the Establishment Clause: yet it does not attempt to do so.

Nor does the dissent's interpretation of standing adequately explain cases such as *Schlesinger* and *Richardson*. According to the dissent, the taxpayer plaintiffs in those cases lacked standing, not because they failed to challenge an exercise of the spending power, but because they did not complain of "the distribution of Government largesse." *Post*, at 511. And yet if the standing of a taxpayer is established by his "continuing stake . . . in the disposition of the Treasury to which he has contributed his taxes," *post*, at 497–498, it would seem to follow that he can assert a right to examine the budget of the CIA, as in *Richardson*, see 418 U. S., at 170, and a right to argue that Members of Congress cannot claim Reserve pay from the Government, as in *Schlesinger*, see 418 U. S., at 211. Of course, both claims have been rejected, precisely because Art. III requires a demonstration of redressable injury that is not satisfied by a claim that tax moneys have been spent unlawfully.

constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. "[T]hat concrete adverseness which sharpens the presentation of issues," *Baker* v. *Carr*, 369 U. S., at 204, is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself.[21]

In reaching this conclusion, we do not retreat from our earlier holdings that standing may be predicated on noneconomic injury. See, *e. g.*, *United States* v. *SCRAP*, 412 U. S., at 686–688; *Association of Data Processing Service Orgs.* v. *Camp*, 397 U. S., at 153–154. We simply cannot see that respondents have alleged an *injury* of *any* kind, economic or otherwise, sufficient to confer standing.[22] Respondents com-

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[21] In *Schlesinger*, we rejected the argument that standing should be recognized because "the adverse parties sharply conflicted in their interests and views and were supported by able briefs and arguments." 418 U. S., at 225:

"We have no doubt about the sincerity of respondents' stated objectives and the depth of their commitment to them. But the essence of standing 'is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct.' *Doremus* v. *Board of Education*, 342 U. S. 429, 435 (1952)." *Id.*, at 225–226.

[22] Respondents rely on our statement in *Association of Data Processing Service Orgs.* v. *Camp*, 397 U. S., at 154, that "[a] person or family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. *Abington School District* v. *Schempp*, 374 U. S. 203 [1963]." Respondents apparently construe this language to mean that any person asserting an Establishment Clause violation possesses a "spiritual stake" sufficient to confer standing. The language will not bear that weight. First, the language cannot be read apart from the context of its accompanying reference to *Abington School District* v. *Schempp*, 374 U. S. 203 (1963). In *Schempp*, the Court invalidated laws that required Bible

plain of a transfer of property located in Chester County, Pa. The named plaintiffs reside in Maryland and Virginia;[23] their organizational headquarters are located in Washington, D. C. They learned of the transfer through a news release. Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court.[24] The federal courts were simply not constituted as ombudsmen of the general welfare.

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reading in the public schools. Plaintiffs were children who attended the schools in question, and their parents. The Court noted:

"It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. . . . The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain." *Id.*, at 224, n. 9.

The Court also drew a comparison with *Doremus* v. *Board of Education*, 342 U. S. 429 (1952), in which the identical substantive issues were raised, but in which the appeal was "dismissed upon the graduation of the school child involved and because of the appellants' failure to establish standing as taxpayers." 374 U. S., at 224, n. 9. The Court's discussion of the standing issue is not extensive, but it is sufficient to show the error in respondents' broad reading of the phrase "spiritual stake." The plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause—for as *Doremus* demonstrated, that is insufficient—but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them. Respondents have alleged no comparable injury.

[23] Respondent Americans United claims that it has certain unidentified members who reside in Pennsylvania. It does not explain, however, how this fact establishes a cognizable injury where none existed before. Respondent is still obligated to allege facts sufficient to establish that one or more of its members has suffered, or is threatened with, an injury other than their belief that the transfer violated the Constitution.

[24] Respondents also claim standing by reference to the Administrative Procedure Act, 5 U. S. C. § 702, which authorizes judicial review at the instance of any person who has been "adversely affected or aggrieved by

V

The Court of Appeals in this case ignored unambiguous limitations on taxpayer and citizen standing. It appears to have done so out of the conviction that enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege "'distinct and palpable injury to himself,' . . . that is likely to be redressed if the requested relief is granted." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., at 100 (quoting *Warth* v. *Seldin*, 422 U. S., at 501). The court derived precedential comfort from *Flast* v. *Cohen:* "The underlying justification for according standing in *Flast* it seems, was the implicit recognition that the Establishment Clause does create in every citizen a personal constitutional right, such that any citizen, including taxpayers, may contest under that clause the constitutionality of federal expenditures." 619 F. 2d, at 262.[25] The concurring opinion was even more direct. In its view, "statutes alleged to violate the Establishment Clause may not have an

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agency action within the meaning of a relevant statute." Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III. See, *e. g.*, *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., at 100; *Warth* v. *Seldin*, 422 U. S., at 501. Respondents do not allege that the Act creates a legal right, "the invasion of which creates standing," *Linda R. S.* v. *Richard D.*, 410 U. S., at 617, n. 3, and there is no other basis for arguing that its existence alters the rules of standing otherwise applicable to this case.

[25] The majority believed that the only thing which prevented this Court from openly acknowledging this position was the fact that the complaint in *Flast* had alleged no basis for standing other than the plaintiffs' taxpayer status. 619 F. 2d, at 262. As the dissent below pointed out, this view is simply not in accord with the facts. See *id.*, at 269–270. The *Flast* plaintiffs and several *amici* strongly urged the Court to adopt the same view of standing for which respondents argue in this case. The Court plainly chose not to do so. Even if respondents were correct in arguing that the Court in *Flast* was bound by a "perceived limitation in the pleadings," 619 F. 2d, at 262, we are not so bound in this case, and we find no merit in respondents' vision of standing.

individual impact sufficient to confer standing in the traditional sense." *Id.*, at 267–268. To satisfy "the need for an available plaintiff," *id.*, at 267, and thereby to assure a basis for judicial review, respondents should be granted standing because, "as a practical matter, no one is better suited to bring this lawsuit and thus vindicate the freedoms embodied in the Establishment Clause," *id.*, at 266.

Implicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme. It does not become more palatable when the underlying merits concern the Establishment Clause. Respondents' claim of standing implicitly rests on the presumption that violations of the Establishment Clause typically will not cause injury sufficient to confer standing under the "traditional" view of Art. III. But "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S., at 227. This view would convert standing into a requirement that must be observed only when satisfied. Moreover, we are unwilling to assume that injured parties are nonexistent simply because they have not joined respondents in their suit. The law of averages is not a substitute for standing.

Were we to accept respondents' claim of standing in this case, there would be no principled basis for confining our exception to litigants relying on the Establishment Clause. Ultimately, that exception derives from the idea that the judicial power requires nothing more for its invocation than important issues and able litigants.[26] The existence of injured

[26] Were we to recognize standing premised on an "injury" consisting solely of an alleged violation of a " 'personal constitutional right' to a gov-

parties who might not wish to bring suit becomes irrelevant. Because we are unwilling to countenance such a departure from the limits on judicial power contained in Art. III, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

A plaintiff's standing is a jurisdictional matter for Art. III courts, and thus a "threshold question" to be resolved before turning attention to more "substantive" issues. See *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 616 (1973). But in consequence there is an impulse to decide difficult questions of substantive law obliquely in the course of opinions purporting to do nothing more than determine what the Court labels "standing"; this accounts for the phenomenon of opinions, such as the one today, that tend merely to obfuscate, rather than inform, our understanding of the meaning of rights under the law. The serious by-product of that practice is that the Court disregards its constitutional responsibility when, by failing to acknowledge the protections afforded by the Constitution, it uses "standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits."[1]

The opinion of the Court is a stark example of this unfortunate trend of resolving cases at the "threshold" while obscur-

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ernment that does not establish religion," *id.*, at 265, a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment, or standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws, to choose but two among as many possible examples as there are commands in the Constitution.

[1] *Barlow* v. *Collins*, 397 U. S. 159, 178 (1970) (BRENNAN, J., concurring in result and dissenting).

ing the nature of the underlying rights and interests at stake. The Court waxes eloquent on the blend of prudential and constitutional considerations that combine to create our misguided "standing" jurisprudence. *But not one word is said about the Establishment Clause right that the plaintiff seeks to enforce.* And despite its pat recitation of our standing decisions, the opinion utterly fails, except by the sheerest form of *ipse dixit*, to explain why this case is unlike *Flast* v. *Cohen*, 392 U. S. 83 (1968), and is controlled instead by *Frothingham* v. *Mellon*, 262 U. S. 447 (1923).

I

There is now much in the way of settled doctrine in our understanding of the injury-in-fact requirement of Art. III. At the core is the irreducible minimum that persons seeking judicial relief from an Art. III court have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends . . . ." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978). Cases of this Court have identified the two essential components of this "personal stake" requirement. Plaintiff must have suffered, or be threatened with, some "distinct and palpable injury," *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975). In addition, there must be some causal connection between plaintiff's asserted injury and defendant's challenged action. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 41 (1976); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 261 (1977). The Constitution requires an Art. III court to ascertain that both requirements are met before proceeding to exercise its authority on behalf of any plaintiff, whether the form of relief requested is equitable or monetary.

But the existence of Art. III injury "often turns on the nature and source of the claim asserted." *Warth* v. *Seldin*,

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supra, at 500.[2] Neither "palpable injury" nor "causation" is a term of unvarying meaning. There is much in the way of "mutual understandings" and "common-law traditions" that necessarily guides the definitional inquiry.[3] *In addition*, the Constitution, and by legislation the Congress, may impart a new, and on occasion unique, meaning to the terms "injury" and "causation" in particular statutory or constitutional contexts. The Court makes a fundamental mistake when it determines that a plaintiff has failed to satisfy the two-pronged "injury-in-fact" test, or indeed any other test of "standing," without first determining whether the Constitution or a statute defines injury, and creates a cause of action for redress of that injury, in precisely the circumstance presented to the Court.

It may of course happen that a person believing himself injured in some obscure manner by government action will be held to have no legal right under the constitutional or statutory provision upon which he relies, and will not be permitted to complain of the invasion of another person's "rights."[4] It

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[2] "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617, n. 3 (1973). The Framers of the Constitution, of course could, and did, exercise the same power.

[3] Justice Frankfurter identified two sources to assist in the definitional inquiry concerning injury:

"A litigant ordinarily has standing to challenge a governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. Or standing may be based on an interest created by the Constitution or a statute." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 152 (1951) (concurring opinion) (citations omitted).

In identifying the types of injuries that might be recognized in private law actions as a basis for suits against the Government, Justice Frankfurter felt free to draw on principles of "common law." *Id.*, at 152–153, 157–160.

[4] Of course, we generally permit persons to press federal suits even when the injury complained of is not obviously within the realm of injuries that a particular statutory or constitutional provision was designed to guard

is quite another matter to employ the rhetoric of "standing" to deprive a person, whose interest is clearly protected by the law, of the opportunity to prove that his own rights have been violated. It is in precisely that dissembling enterprise that the Court indulges today.

The "case and controversy" limitation of Art. III overrides no other provision of the Constitution.[5] To construe that Article to deny standing "'to the class for whose sake [a] constitutional protection is given,'" *Jones* v. *United States*, 362 U. S. 257, 261 (1960), quoting *New York ex rel. Hatch* v. *Reardon*, 204 U. S. 152, 160 (1907), simply turns the Constitution on its head. Article III was designed to provide a

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against. We term that circumstance one of "third-party standing." In such situations, the Constitution requires us to determine whether the injury alleged is sufficiently "palpable" to fall within the contemplation of Art. III. If plaintiff *has* suffered injury in fact within the contemplation of Art. III, but is *not* obviously within the reach of the particular statutory or constitutional provision upon which the plaintiff founds his claim, we then bring prudential considerations to bear to determine whether the plaintiff should be allowed to maintain his action. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 80–81 (1978). In evaluating a claim of "third-party standing," we are, by definition, without specific constitutional or congressional direction, and are thus free to draw upon a wisdom peculiarly judicial in character—to elaborate upon the meaning of constitutionally cognizable injury, and then to weigh considerations of policy along with gleanings of legislative and constitutional intent, in order to determine whether the plaintiff should be permitted to maintain his claim.

With the understanding that "the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met," *id.*, at 81, we have only rarely interposed a bar to "third-party standing," particularly when constitutional violations are alleged. Indeed, the only firm exception to this generally permissive attitude toward third-party suits is the restriction on taxpayer suits. *Id.*, at 79–81.

[5] When the Constitution makes it clear that a particular person is to be protected from a particular form of government action, then that person has a "right" to be free of that action; when that right is infringed, then there is injury, and a personal stake, within the meaning of Art. III.

hospitable forum in which persons enjoying rights under the Constitution could assert those rights. How are we to discern whether a particular person is to be afforded a right of action in the courts? The Framers did not, of course, employ the modern vocabulary of standing. But this much is clear: The drafters of the Bill of Rights surely intended that the particular beneficiaries of their legacy should enjoy rights legally enforceable in courts of law.[6] See *West Virginia Bd. of Education* v. *Barnette*, 319 U. S. 624, 638 (1943).

With these observations in mind, I turn to the problem of taxpayer standing in general, and this case in particular.

II

A

Frothingham v. *Mellon*, 262 U. S. 447 (1923), involved a challenge to the Maternity Act of 1921, 42 Stat. 224, which provided financial grants to States that agreed to cooperate in programs designed to reduce infant and maternal mortality. Appellant contended that Congress, in enacting the program, had exceeded its authority under Art. I, and had intruded on authority reserved to the States. The Court described Mrs. Frothingham's claim as follows:

> "[T]his plaintiff alleges . . . that she is a taxpayer of the United States; and her contention, though not clear, seems to be that the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law. The right of a taxpayer to enjoin the execution

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[6] As James Madison noted, if a bill of rights were "incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong. 439 (1789).

> of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this Court." 262 U. S., at 486.

The Court conceded that it had historically treated the interest of a *municipal* taxpayer in the application of the municipality's funds as sufficiently direct and immediate to warrant injunctive relief to prevent misuse. *Ibid.* *Bradfield* v. *Roberts*, 175 U. S. 291 (1899), in which the Court permitted a federal taxpayer to present an Establishment Clause challenge to the use of federal money for the construction of hospital buildings in the District of Columbia, was held to fall within this rule because it was appropriate to treat the District of Columbia as a municipality.[7] But the Court distinguished Mrs. Frothingham's action against the United States:

> "[T]he relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

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[7] As an attempt to afford a taxpayer living in the District of Columbia with the same rights as a taxpayer living in a municipality, the Court's treatment of *Bradfield* has some persuasive force. But if the ban on federal taxpayer standing had been considered to be of constitutional origin, no analogy could have sufficed to cure the jurisdictional defect. Appellant had not alleged that he was a taxpayer of the District of Columbia, but rather that he was a "citizen and taxpayer *of the United States* and a *resident* of the District of Columbia." 175 U. S., at 295 (emphasis added). Although the court below deemed the suit to be against Ellis H. Roberts, not as Treasurer of the United States but as Treasurer of the District of Columbia, *Roberts* v. *Bradfield*, 12 App. D. C. 453, 459–460 (1898), standing plainly rested on appellant's federal taxpayer status.

> "The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern." 262 U. S., at 487.

After noting the importance of judicial restraint, the Court concluded:

> "The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.*, at 488.

Frothingham's reasoning remains obscure.[8] The principal interpretive difficulty lies in the manner in which *Frothingham* chose to blend the language of policy with seemingly absolute statements about jurisdiction. For example, the Court commented with significance on the sheer number of taxpayers who might have raised a claim similar to that of Mrs. Frothingham. *Id.*, at 487. Yet it can hardly be argued that the Constitution bars from federal court a plaintiff who has suffered injury merely because others are similarly aggrieved. "[S]tanding is not to be denied simply

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[8] The question apparently remains open whether *Frothingham* stated a prudential limitation or identified an Art. III barrier. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S., at 79, n. 25; *United States* v. *Richardson*, 418 U. S. 166, 181, 196, n. 18 (1974) (POWELL, J., concurring). It was generally agreed at the time of *Flast* v. *Cohen*, 392 U. S. 83, 92, n. 6, 101 (1968), and clearly the view of Justice Harlan in dissent, *id.*, at 130, that the rule stated reflected prudential and policy considerations, not constitutional limitations. Perhaps the case is most usefully understood as a "substantive" declaration of the legal rights of a taxpayer with respect to Government spending, coupled with a prudential restriction on the taxpayer's ability to raise the claims of third parties. Under any construction, however, *Frothingham* must give way to a taxpayer's suit brought under the Establishment Clause.

because many people suffer the same injury." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973). And it is equally clear that the Constitution draws no distinction between injuries that are large, and those that are comparatively small. The line between more dollars and less is no valid constitutional measure. Cf. *Everson* v. *Board of Education*, 330 U. S. 1, 48–49 (1947) (Rutledge, J., dissenting). The only distinction that a Constitution guaranteeing justice to all can recognize is one between some injury and none at all.[9]

Frothingham also stressed the indirectness of the taxpayer's injury. But, *as a matter of Art. III standing*, if the causal relationship is sufficiently certain, the length of the causal chain is irrelevant.[10] See *Warth* v. *Seldin*, 422 U. S., at 505. The financial stake of a federal taxpayer in the outcome of a lawsuit challenging an allegedly unlawful federal expenditure is not qualitatively different from that of a state or a municipal taxpayer attacking a local expenditure. More importantly, the injury suffered by a taxpayer is not dependent on the extent of his tax payment. The concept of taxpayer injury necessarily recognizes the continuing stake of the taxpayer in the disposition of the Treasury to which he

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[9] Indeed, as noted in *Flast*, *supra*, the stake in the federal Treasury of major corporate taxpayers was not in any sense trivial. Indeed there was a time when a federal program involving an expenditure from the Treasury of $10 billion would very likely result in an increase of $150 million in the tax bill of a major corporation such as General Motors. See Hearings on S. 2097 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2nd Sess., pt. 2, p. 493 (1966) (letter from K. C. Davis to Sen. Sam Ervin); Note, 69 Yale L. J. 895, 917, n. 127 (1960).

[10] Even if actual impact on the taxpayer's pocketbook were deemed the test of taxpayer standing, the cases in which a tenuous causal connection between the injury alleged and the challenged action formed the basis for denying plaintiffs standing do not control the case of a taxpayer challenging a Government expenditure. Compare *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26 (1976); *Warth* v. *Seldin*, 422 U. S. 490 (1975); *Linda R. S.* v. *Richard D.*, 410 U. S. 614 (1973); with *Duke Power*

has contributed his taxes, and his right to have those funds put to lawful uses. Until *Frothingham* there was nothing in our precedents to indicate that this concept, so comfortably applied to municipal taxpayers, was inconsistent with the framework of rights and remedies established by the Federal Constitution.

The explanation for the limit on federal taxpayer "standing" imposed by *Frothingham* must be sought in more substantive realms. Justice Harlan, dissenting in *Flast*, came close to identifying what I consider the unstated premise of the *Frothingham* rule:

> "[The] taxpayer's complaint can consist only of an allegation that public funds have been, or shortly will be, expended for purposes inconsistent with the Constitution. The taxpayer cannot ask the return of any portion of his previous tax payments, cannot prevent the collection of any existing tax debt, and cannot demand an adjudication of the propriety of any particular level of taxation. His tax payments are received for the general purposes of the United States, and are, upon proper receipt, lost in the general revenues." 392 U. S., at 128.

Co. v. *Carolina Environmental Study Group, Inc.*, *supra;* and *United States* v. *SCRAP*, 412 U. S. 669 (1973). Frothingham's obstacle was not an inability to show that the alleged injury was "likely to be redressed by a favorable decision." *Simon*, *supra*, at 38.

In each of the above-cited cases in which standing was denied, the difficulty was that an intermediate link in the causal chain—a third party beyond the control of the court—might serve to bar effective relief. Even if the court acceded to plaintiffs' view of the law, the court's decree might prove ineffectual to relieve plaintiffs' injury because of the independent action of some third party. See 426 U. S., at 41–42; *Warth* v. *Seldin*, *supra*, at 505–507. The situation of the taxpayer is not comparable because there is no problem of intervening cause. The defendant has the full power to correct the plaintiff's difficulty and, if the court concludes that as a matter of law and fact plaintiff is indeed required to provide defendant redress, it has the power to provide relief. The factual aspect of the causal connection is sure.

In a similar vein, the Government argued in *Flast* that taxpayer suits involve only a disagreement by the taxpayer with the uses to which tax revenues were committed, and that the resolution of such disagreements is entrusted to branches of the Federal Government other than the judiciary. *Id.*, at 98. The arguments of both the Government and Justice Harlan are phrased, as they must be, not in the language of "standing," but of "legal rights" and "justiciable issues."

The *Frothingham* rule may be seen as founded solely on the prudential judgment by the Court that precipitate and unnecessary interference in the activities of a coequal branch of government should be avoided. Alternatively, *Frothingham* may be construed as resting upon an unarticulated, constitutionally established barrier between Congress' power to tax and its power to spend, which barrier makes it analytically impossible to mount an assault on the former through a challenge to the latter. But it is sufficient for present purposes to say that *Frothingham* held that the federal taxpayer has no continuing legal interest in the affairs of the Treasury analogous to a shareholder's continuing interest in the conduct of a corporation.

Whatever its provenance, the general rule of *Frothingham* displays sound judgment: Courts must be circumspect in dealing with the taxing power in order to avoid unnecessary intrusion into the functions of the Legislative and Executive Branches. Congress' *purpose* in taxing will not ordinarily affect the validity of the tax. Unless the tax *operates* unconstitutionally, see, *e. g.*, *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), the taxpayer may not object to the use of his funds. Mrs. Frothingham's argument, that the use of tax funds for purposes unauthorized by the Constitution amounted to a violation of due process, did not provide her with the required legal interest because the Due Process Clause of the Fifth Amendment does not protect taxpayers against increases in tax liability. See *Flast* v. *Cohen*, 392 U. S., at 105. Mrs. Frothingham's claim was thus reduced

to an assertion of "the States' interest in their legislative prerogatives," *ibid.*, a third-party claim that could properly be barred.[11] But in *Flast* the Court faced a different sort of constitutional claim, and found itself compelled to retreat from the general assertion in *Frothingham* that taxpayers have *no* interest in the disposition of their tax payments. To understand why *Frothingham*'s bar necessarily gave way in the face of an Establishment Clause claim, we must examine the right asserted by a taxpayer making such a claim.

B

In 1947, nine Justices of this Court recognized that the Establishment Clause does impose a very definite restriction on the power to tax.[12] The Court held in *Everson* v. *Board of Education*, 330 U. S., at 15, that the "'establishment of religion' clause of the First Amendment means at least this:"

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[11] With respect to the enforcement of constitutional restrictions, we have not been overly elegant in defining the class of persons who may object to particular forms of government action. Only the constitutional minimum of injury in fact has been required. As the Court recently noted: "We . . . cannot accept the contention that, outside the context of taxpayers' suits, a litigant must demonstrate something more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S., at 79. See *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208, 225, n. 15 (1974). Nevertheless, I do not suggest that the *Frothingham* limitation on federal taxpayer suits should be abandoned. The barrier it evinces between the taxing power and the spending power, whether it be deemed one of constitutional construction or judicial prudence, reflects fundamental conceptions about the nature of the legislative process, and is, in any event, now firmly embedded in our cases. That barrier is necessarily pierced, however, by an Establishment Clause claim.

[12] Justice Black, joined by Chief Justice Vinson, and Justices Reed, Douglas, and Murphy, wrote for the majority and concluded that the challenged activity was not a support of religion; Justice Jackson wrote one dissent joined in by Justice Frankfurter; Justice Rutledge also authored a dissent, in which Justices Jackson, Frankfurter, and Burton joined. Both dissents clearly affirmed this constitutional restriction on the power to tax. 330 U. S., at 22, 33.

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt, to teach or practice religion." *Id.*, at 16.

The Members of the Court could not have been more explicit. "One of our basic rights is to be free of taxation to support a transgression of the constitutional command that the authorities 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" *Id.*, at 22 (Jackson, J., dissenting). "[A]part from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through the use of the taxing power to support religion, religious establishments, or establishments having a religious foundation whatever their form or special religious function. . . . [M]oney taken by taxation from one is not to be used or given to support another's religious training of belief, or indeed one's own." *Id.*, at 44 (Rutledge, J., dissenting).

In determining whether the law challenged in *Everson* was one "respecting an establishment of religion," the Court did not fail to examine the historic meaning of the constitutional language, "particularly with respect to the imposition of taxes." *Id.*, at 8. For as Justice Rutledge pointed out in his dissent: "No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history." *Id.*, at 33. That history bears a brief repetition in the present context.

Many of the early settlers of this Nation came here to escape the tyranny of laws that compelled the support of government-sponsored churches and that inflicted punishments for the failure to pay establishment taxes and tithes. *Id.*, at 8–9. But the inhabitants of the various Colonies soon dis-

played a capacity to recreate the oppressive practices of the countries that they had fled. Once again persons of minority faiths were persecuted, and again such persons were subjected—this time by the colonial governments—to tithes and taxes for support of religion. *Id.*, at 10, and n. 8; *Reynolds* v. *United States*, 98 U. S. 145, 162–163 (1879).

> "These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment." *Everson*, *supra*, at 11 (footnotes omitted).

In 1784–1785, before the adoption of the Constitution, the continuing conflict between those who saw state aid to religion as but the natural expression of "commonly shared" religious sentiments, and those who saw such support as a threat to the very notion of civil government, culminated in the battle fought in the Virginia House of Delegates over "a bill establishing provision for teachers of the Christian religion."[13] *Reynolds*, *supra*, at 162–163. The introduction of that bill in the state assembly prompted James Madison to prepare and circulate his famous "Memorial and Remonstrance Against Religious Assessments," imploring the legislature to establish and maintain the complete separation of religion and civil authority, and thus to reject the bill. In the end, the bill was rejected by the Virginia Legislature, and in its place Madison succeeded in securing the enactment of "A Bill for Establishing Religious Freedom," first introduced in the Virginia General Assembly seven years earlier by Thomas Jefferson. 98 U. S., at 163; *Everson*, 330 U. S.,

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[13] The bill, and Madison's Remonstrance, are both appended to the dissenting opinion of Justice Rutledge in *Everson*. *Id.*, at 63–74.

at 11–13 (majority opinion); *id.*, at 35–40 (Rutledge, J., dissenting). Because Madison and Jefferson played such leading roles in the events leading to the adoption of the First Amendment, the *Everson* opinions did not hesitate to reproduce the partial text of their Virginia bill as a primary source for understanding the objectives, and protections, afforded by the more concise phrasing of the Establishment Clause. *Everson*, *supra*, at 12–13, 28; see *Reynolds*, *supra*, at 163–164. Extracts from that bill also bear repeating in the present context. The preamble provided, in part:

> "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern." 12 Hening's Stat. 85.

Its operative language emphatically stated:

> "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . . ." *Id.*, at 86.[14]

Justice Rutledge summed up Madison's views in the following terms:

> "In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation. Not even 'three pence' contribution was thus to be exacted from

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[14] Although the bill is in some sense merely the pronouncement of a small legislative body, its proscription was intended to transcend temporal bounds. The enactment concludes:

"And though we well know that this Assembly, enacted by the people for the ordinary purposes of legislation only, have no power to restrain the

> any citizen for such a purpose. Tithes had been the lifeblood of establishment before and after other compulsions disappeared. Madison and his coworkers made no exceptions or abridgments to the complete separation [between church and state] they created. Their objection was not to small tithes. It was to any tithes whatsoever. 'If it were lawful to impose a small tax for religion, the admission would pave the way for oppressive levies.' Not the amount, but 'the principle of the assessment was wrong.'" *Everson*, *supra*, at 40–41 (citation omitted).

It is clear, in the light of this history, that one of the primary purposes of the Establishment Clause was to prevent the use of tax moneys for religious purposes. *The taxpayer was the direct and intended beneficiary of the prohibition on financial aid to religion.*[15] This basic understanding of the meaning of the Establishment Clause explains why the Court in *Everson*, while rejecting appellant's claim on the merits,

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acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right." 12 Hening's Stat. 86.

By incorporation of its principles in the Bill of Rights, the bill was transformed from mere hortatory expression, into a guarantee of lasting and binding rights against the Government.

[15] The position of a taxpayer with respect to a Government grant of a tax exemption to a religious institution is qualitatively different from the position of a taxpayer objecting to a subsidy.

"A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, '[i]n the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches,' while '[i]n the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by

perceived the issue presented there as it did. The appellant sued "in his capacity as a district taxpayer," 330 U. S., at 3, challenging the actions of the Board of Education in passing a resolution providing reimbursement to parents for the cost of transporting their children to parochial schools, and seeking to have that resolution "set aside." Appellant's Establishment Clause claim was precisely that the "statute . . . forced inhabitants to pay taxes to help support and maintain" church schools. *Id.*, at 5. It seems obvious that all the Justices who participated in *Everson* would have agreed with Justice Jackson's succinct statement of the question presented: "Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?" *Id.*, at 21 (dissenting opinion). Given this view of the issues, could it fairly be doubted that this taxpayer alleged injury in precisely the form that the Establishment Clause sought to make actionable?[16]

C

In *Flast* v. *Cohen*, 392 U. S. 83 (1968), federal taxpayers sought to challenge the Department of Health, Education, and Welfare's administration of the Elementary and Second-

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the churches through voluntary contributions.'" *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664, 690–691 (1970) (BRENNAN, J., concurring) (footnote omitted), quoting Gianella, Religious Liberty, Nonestablishment, and Doctrinal Development, pt. 2, 81 Harv. L. Rev. 513, 533 (1968).

Of course, irrespective of the taxpayers' stake in the controversy, in terms of the prohibition on government action imposed by the Establishment Clause, there is also a qualitative difference between a subsidy and an exemption. *Ibid.*

[16] Justice Jackson, writing for the Court in *Doremus* v. *Board of Education*, 342 U. S. 429 (1952), explored the limitations of taxpayer standing under the Establishment Clause. In that case two New Jersey taxpayers challenged a New Jersey law that directed public school teachers to read selected passages from the Bible, seeking a declaratory judgment that such a law violated the Establishment Clause. The Court concluded that the taxpayer lacked standing:

"There is no allegation that this activity is supported by any separate tax

ary Education Act of 1965: specifically the Department's practice of allowing funds distributed under that Act to be used to finance instruction in religious schools. Appellants urged that the use of federal funds for such a purpose violated the Establishment and Free Exercise Clauses of the First Amendment, and sought a declaration that this use of federal funds was not authorized by the Act, or that to the extent the use was authorized, the Act was "unconstitutional and void." Appellants further sought an injunction to bar appellees from approving any expenditure of funds for the allegedly unconstitutional purposes. *Id.*, at 86–88. The *Frothingham* rule stood as a seemingly absolute barrier to the maintenance of the claim. The Court held, however, that the *Frothingham* barrier could be overcome by any claim that met both requirements of a two-part "nexus" test.

The Justices who participated in *Flast* were not unaware of the Court's continued recognition of a federally cognizable "case or controversy" when a *local* taxpayer seeks to challenge as unconstitutional the use of a *municipality's* funds—

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or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school. No information is given as to what kind of taxes are paid by appellants and there is no averment that the Bible reading increases any tax they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it." *Id.*, at 433.

The Court had no difficulty distinguishing *Everson:*

"Everson showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of. This complaint does not." 342 U. S., at 434.

The difference between the two cases is relevant to the "standing" of taxpayers generally and most especially to taxpayers asserting claims under the Establishment Clause, for it is clear that even under the Establishment Clause the taxpayer's protection was against the use of his funds and not against the conduct of the government generally. The distinction between *Doremus* and *Everson* may be phrased alternatively: Everson was injured in a manner comprehended by the Establishment Clause, and Doremus was not.

the propriety of which had, of course, gone unquestioned in *Everson*.[17] The Court was aware as well of the rule stated in *Doremus* v. *Board of Education*, 342 U. S. 429 (1952), that the interest of a taxpayer, even one raising an Establishment Clause claim, was limited to the actions of a government involving the expenditure of funds. But in reaching its holding, it is also quite clear that the Court was responding, not only to *Everson*'s continued acceptance of municipal taxpayer actions but also to *Everson*'s exposition of the history and meaning of the Establishment Clause. See *Flast*, *supra*, at 103–104.

It is at once apparent that the test of standing formulated by the Court in *Flast* sought to reconcile the developing doctrine of taxpayer "standing" with the Court's historical understanding that the Establishment Clause was intended to prohibit the Federal Government from using tax funds for the advancement of religion, and thus the constitutional imperative of taxpayer standing in certain cases brought pursuant to the Establishment Clause. The two-pronged "nexus" test offered by the Court, despite its general language,[18] is

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[17] The anomaly of allowing a municipality's actions to be challenged by a local taxpayer in federal court as a violation of the Establishment Clause, made applicable to the States by virtue of the Fourteenth Amendment, while exempting the Federal Government, whose use of the taxing power in aid of religion was the target of the Framers' adoption of the Establishment Clause, also must have been apparent to the Court.

[18] The test was formulated with the Establishment Clause in mind, but the Court wisely sought to phrase the principle it stood for in general terms:

"We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8. Whether the Constitution contains other specific limitations can be determined only in the context of future cases. However, whenever such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress. Consequently, we hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional

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best understood as "a determinant of standing of plaintiffs alleging only injury as taxpayers who challenge alleged violations of the Establishment and Free Exercise Clauses of the First Amendment," and not as a general statement of standing principles. *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208, 238 (1974) (BRENNAN, J., dissenting); *Flast*, 392 U. S., at 102. The test explains what forms of governmental action may be attacked by someone alleging *only* taxpayer status, and, without ruling out the possibility that history might reveal another similarly founded provision, explains why an Establishment Clause claim is treated differently from any other assertion that the Federal Government has exceeded the bounds of the law in allocating its largesse. Thus, consistent with *Doremus*, *Flast* required, as the first prong of its test, that the taxpayer demonstrate a logical connection between his taxpayer status and the type of legislation attacked. *Flast*, *supra*, at 102. Appellants' challenge to a program of grants to educational institutions clearly satisfied this first requirement. 392 U. S., at 103. As the second prong, consistent with the prohibition of taxpayer claims of the kind advanced in *Frothingham*, appellants were required to show a connection between their status and the precise nature of the infringement alleged. *Flast*, 392 U. S., at 102. They had no difficulty meeting this requirement: the Court agreed that the Establishment Clause jealously protects taxpayers from diversion of their funds to the support of religion through the offices of the Federal Government. *Id.*, at 103–104.

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action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." 392 U. S., at 105–106.

In the years since the announcement of the *Flast* test we have yet to recognize a similar restriction on Congress' power to tax, and I know of none. Nevertheless, like the Justices who joined in the Court opinion in *Flast*, I remain reluctant to rule out the possibility.

The nexus test that the Court "announced," *id.*, at 102–103, sought to maintain necessary continuity with prior cases, and set forth principles to guide future cases involving taxpayer standing. But *Flast* did not depart from the principle that no judgment about standing should be made without a fundamental understanding of the rights at issue. *Id.*, at 102. The two-part *Flast* test did not supply the rationale for the Court's decision, but rather its exposition: That rationale was supplied by an understanding of the nature of the restrictions on government power imposed by the Constitution and the intended beneficiaries of those restrictions.

It may be that Congress can tax for *almost* any reason, or for no reason at all. There is, so far as I have been able to discern, but one constitutionally imposed limit on that authority. Congress cannot use tax money to support a church, or to encourage religion. That is "*the* forbidden exaction." *Everson* v. *Board of Education*, 330 U. S., at 45 (Rutledge, J., dissenting) (emphasis added). See *Flast*, *supra*, at 115–116 (Fortas, J., concurring). In absolute terms the history of the Establishment Clause of the First Amendment makes this clear. History also makes it clear that the federal taxpayer is a singularly "proper and appropriate party to invoke a federal court's jurisdiction" to challenge a federal bestowal of largesse as a violation of the Establishment Clause. Each, and indeed every, federal taxpayer suffers precisely the injury that the Establishment Clause guards against when the Federal Government directs that funds be taken from the pocketbooks of the citizenry and placed into the coffers of the ministry.

A taxpayer cannot be asked to raise his objection to such use of his funds at the time he pays his tax. Apart from the unlikely circumstance in which the Government announced in advance that a particular levy would be used for religious subsidies, taxpayers could hardly assert that they were being injured until the Government actually lent its support to a religious venture. Nor would it be reasonable to require him to address his claim to those officials charged with the collec-

tion of federal taxes. Those officials would be without the means to provide appropriate redress—there is no practical way to segregate the complaining taxpayer's money from that being devoted to the religious purpose. Surely, then, a taxpayer must have standing at the time that he learns of the Government's alleged Establishment Clause violation to seek equitable relief in order to halt the continuing and intolerable burden on his pocketbook, his conscience, and his constitutional rights.

III

Blind to history, the Court attempts to distinguish this case from *Flast* by wrenching snippets of language from our opinions, and by perfunctorily applying that language under color of the first prong of *Flast*'s two-part nexus test. The tortuous distinctions thus produced are specious, at best: at worst, they are pernicious to our constitutional heritage.

First, the Court finds this case different from *Flast* because here the "source of [plaintiffs'] complaint is not a *congressional* action, but a decision by HEW to transfer a parcel of federal property." *Ante*, at 479 (emphasis added). This attempt at distinction cannot withstand scrutiny. *Flast* involved a challenge to the actions of the Commissioner of Education, and other officials of HEW, in disbursing funds under the Elementary and Secondary Education Act of 1965 to "religious and sectarian" schools. Plaintiffs disclaimed "any intent[ion] to challenge . . . all programs under . . . the Act." *Flast*, *supra*, at 87. Rather, they claimed that defendant-administrators' approval of such expenditures was not authorized by the Act, or alternatively, to the extent the expenditures were authorized, the Act was "unconstitutional and void." *Ibid.* In the present case, respondents challenge HEW's grant of property pursuant to the Federal Property and Administrative Services Act of 1949, seeking to enjoin HEW "from making a grant of this and other property to the [defendant] so long as such a grant will violate the Establishment Clause." App. 12. It may be that the Court is concerned with the adequacy of respondents' pleading; re-

spondents have not, in so many words, asked for a declaration that the "Federal Property and Administrative Services Act is unconstitutional and void to the extent that it authorizes HEW's actions." I would not construe their complaint so narrowly.

More fundamentally, no clear division can be drawn in this context between actions of the Legislative Branch and those of the Executive Branch. To be sure, the First Amendment is phrased as a restriction on Congress' legislative authority; this is only natural since the Constitution assigns the authority to legislate and appropriate only to the Congress. But it is difficult to conceive of an expenditure for which the last governmental actor, either implementing directly the legislative will, or acting within the scope of legislatively delegated authority, is not an Executive Branch official. The First Amendment binds the Government as a whole, regardless of which branch is at work in a particular instance.

The Court's second purported distinction between this case and *Flast* is equally unavailing. The majority finds it "decisive" that the Federal Property and Administrative Services Act of 1949 "was an evident exercise of Congress' power under the Property Clause, Art. IV, § 3, cl. 2," *ante*, at 480, while the Government action in *Flast* was taken under Art. I, § 8. The Court relies on *United States* v. *Richardson*, 418 U. S. 166 (1974), and *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208 (1974), to support the distinction between the two Clauses, noting that those cases involved alleged deviations from the requirements of Art. I, § 9, cl. 7, and Art. I, § 6, cl. 2, respectively. The standing defect in each case was *not*, however, the failure to allege a violation of the Spending Clause; rather, the taxpayers in those cases had not complained of the distribution of Government largesse, and thus failed to meet the essential requirement of taxpayer standing recognized in *Doremus*.

It can make no constitutional difference in the case before us whether the donation to the petitioner here was in the form of a cash grant to build a facility, see *Tilton* v. *Richard-*

son, 403 U. S. 672 (1971), or in the nature of a gift of property including a facility already built. That this is a meaningless distinction is illustrated by *Tilton*. In that case, taxpayers were afforded standing to object to the fact that the Government had not received adequate assurance that if the property that it financed for use as an educational facility was later converted to religious uses, it would receive full value for the property, as the Constitution requires. The complaint here is precisely that, although the property at issue is actually being used for a sectarian purpose, the Government has not received, nor demanded, full value payment.[19] Whether undertaken pursuant to the Property Clause or the Spending Clause, the breach of the Establishment Clause, and the relationship of the taxpayer to that breach, is precisely the same.[20]

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[19] It is uncontested here that the property at issue was initially purchased with tax funds, and bears the mark of $10 million in federal improvements. At the time of its transfer to the petitioner, its fair market value was approximately $1.3 million. *Americans United* v. *U. S. Dept. of HEW*, 619 F. 2d 252, 253 (CA3 1980).

The Federal Property and Administrative Services Act of 1949 clearly requires that, whenever possible, fair market value is to be received for property transferred pursuant to its provisions. See 40 U. S. C. §§ 484(e)(1), 484(e)(3)(G). Proceeds "from any sale, lease, or other disposition of surplus property, shall be covered into the Treasury as miscellaneous receipts . . . ." 40 U. S. C. § 485(a).

The Act provides, however, that "surplus real property, including buildings, fixtures and equipment situated thereon" may be designated by HEW as necessary for "school, classroom, or other educational use." 40 U. S. C. § 484(k)(1). Such property may be transferred to a "nonprofit educational institution." 40 U. S. C. § 484(k)(1)(A). In fixing the price of such property, the Secretary is required to consider any benefit that may accrue to the United States from the use of the property. 40 U. S. C. § 484(k)(1)(C). By failing to require any payment from petitioner college, the Secretary apparently determined that the benefit to the United States exceeded the fair market value. But it is entirely clear from *Tilton* that if the facility is and was used for sectarian purposes, the Government was required to obtain full market value at the time such use commences.

[20] The Framers of the First Amendment could not have viewed it as less objectionable to the taxpayer to learn that his tax funds were used by his

IV

Plainly hostile to the Framers' understanding of the Establishment Clause, and *Flast*'s enforcement of that understanding, the Court vents that hostility under the guise of standing, "to slam the courthouse door against plaintiffs who [as the Framers intended] are entitled to full consideration of their [Establishment Clause] claims on the merits." *Barlow* v. *Collins*, 397 U. S. 159, 178 (1970) (BRENNAN, J., concurring in result and dissenting). Therefore, I dissent.

JUSTICE STEVENS, dissenting.

In Parts I, II, and III of his dissenting opinion, JUSTICE BRENNAN demonstrates that respondent taxpayers have standing to mount an Establishment Clause challenge against the Federal Government's transfer of property worth $1,300,000 to the Assemblies of God. For the Court to hold

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Government to purchase property, construct a church, and deed the property to a religious order, than to find his Government providing the funds to a church to undertake its own construction. So far as the Establishment Clause and the position of the taxpayer are concerned, the situations are interchangeable. Surely James Madison perceived no nice distinction between a grant of land and a grant of funds, when he vetoed a bill providing certain land to a church:

"[T]he bill in reserving a certain parcel of land of the United States for the use of said [church] comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'" 1 J. Richardson, Messages and Papers of the Presidents 490 (1897).

Nor has Congress perceived a distinction between an appropriation of money and an appropriation of property. For example, in 1896 Congress included in its Appropriation Act for the District of Columbia a statement declaring it "to be the policy of the Government of the United States to make no appropriation of money or property for the purpose of founding, maintaining, or aiding by payment for services, expenses, or otherwise, any church or religious denomination, or any institution or society which is under sectarian or ecclesiastical control." 29 Stat. 411. See *Lemon* v. *Kurtzman*, 403 U. S. 602, 648 (1971) (opinion of BRENNAN, J.).

that plaintiffs' standing depends on whether the Government's transfer was an exercise of its power to spend money, on the one hand, or its power to dispose of tangible property, on the other, is to trivialize the standing doctrine.

One cannot read the Court's opinion and the concurring opinions of Justice Stewart and Justice Fortas in *Flast* v. *Cohen*, 392 U. S. 83, without forming the firm conclusion that the plaintiffs' invocation of the Establishment Clause was of decisive importance in resolving the standing issue in that case. Justice Fortas made this point directly:

> "I agree that the congressional powers to tax and spend are limited by the prohibition upon Congress to enact laws 'respecting an establishment of religion.' This thesis, slender as its basis is, provides a direct 'nexus,' as the Court puts it, between the use and collection of taxes and the congressional action here. Because of this unique 'nexus,' in my judgment, it is not far-fetched to recognize that a taxpayer has a special claim to status as a litigant in a case raising the 'establishment' issue. This special claim is enough, I think, to permit us to allow the suit, coupled, as it is, with the interest which the taxpayer and all other citizens have in the church-state issue. In terms of the structure and basic philosophy of our constitutional government, it would be difficult to point to any issue that has a more intimate, pervasive, and fundamental impact upon the life of the taxpayer—and upon the life of all citizens.
>
> "Perhaps the vital interest of a citizen in the establishment issue, without reference to his taxpayer's status, would be acceptable as a basis for this challenge. We need not decide this. But certainly, I believe, we must recognize that our principle of judicial scrutiny of legislative acts which raise important constitutional questions requires that the issue here presented—the separation of state and church—which the Founding Fathers re-

> garded as fundamental to our constitutional system—should be subjected to judicial testing. This is not a question which we, if we are to be faithful to our trust, should consign to limbo, unacknowledged, unresolved, and undecided.
>
> "On the other hand, the urgent necessities of this case and the precarious opening through which we find our way to confront it, do not demand that we open the door to a general assault upon exercises of the spending power. The status of taxpayer should not be accepted as a launching pad for an attack upon any target other than legislation affecting the Establishment Clause." *Id.*, at 115–116.

Today the Court holds, in effect, that the Judiciary has no greater role in enforcing the Establishment Clause than in enforcing other "norm[s] of conduct which the Federal Government is bound to honor," *ante*, at 484, such as the Accounts Clause, *United States* v. *Richardson*, 418 U. S. 166, and the Incompatibility Clause, *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208. Ironically, however, its decision rests on the premise that the difference between a disposition of funds pursuant to the Spending Clause and a disposition of realty pursuant to the Property Clause is of fundamental jurisprudential significance. With all due respect, I am persuaded that the essential holding of *Flast* v. *Cohen* attaches special importance to the Establishment Clause and does not permit the drawing of a tenuous distinction between the Spending Clause and the Property Clause.

For this reason, and for the reasons stated in Parts I, II, and III of JUSTICE BRENNAN's opinion, I would affirm the judgment of the Court of Appeals.

TEXACO, INC., ET AL. *v.* SHORT ET AL.

APPEAL FROM THE SUPREME COURT OF INDIANA

No. 80–965. Argued October 6, 1981—Decided January 12, 1982*

The Indiana Dormant Mineral Interests Act, more commonly known as the Mineral Lapse Act, provides that a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property, unless the mineral owner prior to the end of the 20-year period or within a 2-year grace period after the effective date of the Act (September 2, 1971) files a statement of claim in the local county recorder's office. The "use" of a mineral interest sufficient to preclude its extinction includes actual or attempted production of the minerals, payment of rents or royalties, and payment of taxes. The statute contains one exception to the general rule: If an owner of 10 or more mineral interests in the same county files a statement of claim that inadvertently omits some of those interests, the omitted interests may be preserved by a supplemental filing made within 60 days of receiving notice of the lapse. Appellants whose unused mineral interests had lapsed upon expiration of the grace period under the Act, challenged the constitutionality of the Act in actions brought in Indiana state court. They claimed that under the Fourteenth Amendment the lack of prior notice of the lapse deprived them of property without due process of law, the statute effected a taking of property for public use without just compensation, and the exception for owners of 10 or more mineral interests denied them the equal protection of the law. They also contended that the statute constitutes an impairment of contracts in violation of the Contract Clause. The trial court declared the statute unconstitutional, but the Indiana Supreme Court reversed.

Held:

1. The State has the power to enact the kind of statute in issue, and in this instance has not exercised this power in an arbitrary manner. Each of the actions required to avoid an abandonment of a mineral interest furthers the legitimate state goals of encouraging mineral interest owners to develop such interests and of collecting property taxes. Pp. 525–530.

2. The Act does not take property without just compensation in violation of the Fourteenth Amendment. Since the State may treat as abandoned a mineral interest that has not been used for 20 years and for which no statement of claim has been filed, it follows that, after abandon-

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*Together with No. 80–1018, *Pond et al.* v. *Walden et al.*, also on appeal from the same court.

ment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make any use of the property—and not the State's action—that causes the lapse of the property right; there is no "taking" that requires compensation. P. 530.

3. Nor does the Act unconstitutionally impair the obligation of contracts. Since appellant mineral owners did not execute any coal and oil leases until after the statutory lapse of their mineral rights, the statute cannot be said to impair a contract that did not exist at the time of its enactment. While appellants' right to enter such an agreement has been impaired, this right is a property, not a contract, right. P. 531.

4. The Act did not extinguish appellants' property without adequate notice in violation of their due process rights. Pp. 531–538.

(a) The 2-year grace period provided by the statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms. Property owners are charged with knowledge of relevant statutory provisions affecting the control or disposition of their property. Moreover, the greatest deference must be accorded to the judgment of state legislatures as to whether a statutory grace period provides an adequate opportunity for citizens to become familiar with a new law. Here, both the Indiana Legislature and the Indiana Supreme Court have concluded that the 2-year grace period was sufficient to allow property owners to familiarize themselves with the statute and to take appropriate action to protect existing interests. Pp. 531–533.

(b) Given appellants' presumed knowledge that their unused mineral interests would lapse unless they filed a statement of claim, appellants had no constitutional right to be advised that the 20-year period of nonuse was about to expire. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, distinguished. Since the State may impose on a mineral interest owner the burden of using that interest or filing a statement of claim, it follows that the State may impose on him the lesser burden of keeping informed of the use or nonuse of his own property. Pp. 533–538.

5. Since the statutory exception for owners of 10 or more mineral interests furthers the legitimate statutory purpose of encouraging multiple ownership as being more conducive to the actual production of mineral resources, and has no adverse impact on persons like appellants who own fewer mineral interests, the exception does not violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 538–540.

—— Ind. ——, 406 N. E. 2d 625, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which WHITE, MARSHALL, and POWELL, JJ., joined, *post*, p. 540.

John L. Carroll argued the cause for appellants in both cases and filed briefs for appellants in No. 80–965. *James M. Buthod* and *Mark W. Rietman* filed briefs for appellants in No. 80–1018.

Verner P. Partenheimer argued the cause for appellees in both cases. With him on the brief were *Ronald W. Polston*, *Linley E. Pearson*, *Jack R. O'Neill*, and *Charles R. Nixon*.†

JUSTICE STEVENS delivered the opinion of the Court.

In 1971 the Indiana Legislature enacted a statute providing that a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property, unless the mineral owner files a statement of claim in the local county recorder's office.[1] The Indiana Supreme Court rejected a challenge to the constitutionality of the statute. —— Ind. ——, 406 N. E. 2d 625 (1980). We noted probable jurisdiction, 450 U. S. 993, and now affirm.

As the Indiana Supreme Court explained, the Mineral Lapse Act "puts an end to interests in coal, oil, gas or other minerals which have not been used for twenty years."[2] The statute provides that the unused interest shall be "extinguished" and that its "ownership shall revert to the then owner of the interest out of which it was carved."[3] The statute, which became effective on September 2, 1971, contained a 2-year grace period in which owners of mineral interests

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†*John M. Rosenberg* filed a brief for Save our Cumberland Mountains, Inc., et al., as *amici curiae* urging affirmance.

[1] The statute is entitled the Dormant Mineral Interests Act, and is more commonly known as the Mineral Lapse Act. Ind. Code §§ 32–5–11–1 through 32–5–11–8 (1976), as added by 1971 Ind. Acts, Pub. L. 423, § 1.

[2] —— Ind., at ——, 406 N. E. 2d, at 627.

[3] "Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five hereof *[sic]*, and the ownership shall revert to the then owner of the interest out of which it was carved." Ind. Code § 32–5–11–1 (1976).

that were then unused and subject to lapse could preserve those interests by filing a claim in the recorder's office.[4]

The "use" of a mineral interest[5] that is sufficient to preclude its extinction includes the actual or attempted production of minerals, the payment of rents or royalties, and any payment of taxes;[6] a mineral owner may also protect his interest by filing a statement of claim with the local recorder of deeds.[7] The statute contains one exception to this general

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[4] See n. 7, *infra*.

[5] As defined by the Act: "A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals." Ind. Code § 32–5–11–2 (1976). The Indiana Supreme Court described the nature of this interest as follows:

"Interests or estates in oil, gas, coal and other minerals lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action. They are vested property interests separate and distinct from the surface ownership. The State has no power to deprive an owner of such an interest without due process of law. They are entitled to the same protection as are fee simple titles. They are themselves of great utility and benefit to the society as a means of facilitating the development of natural resources." —— Ind., at ——, 406 N. E. 2d, at 627.

[6] "A mineral interest shall be deemed to be used when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument." Ind. Code § 32–5–11–3 (1976).

[7] "The statement of claim provided in section one above shall be filed by the owner of the mineral interest prior to the end of the twenty year period set forth in section two [*sic*] or within two years after the effective date of this act, whichever is later, and shall contain the name and address of the

rule: if an owner of 10 or more interests in the same county files a statement of claim that inadvertently omits some of those interests, the omitted interests may be preserved by a supplemental filing made within 60 days of receiving actual notice of the lapse.[8]

The statute does not require that any specific notice be given to a mineral owner prior to a statutory lapse of a mineral estate. The Act does set forth a procedure, however, by which a surface owner who has succeeded to the ownership of a mineral estate pursuant to the statute may give notice that the mineral interest has lapsed.[9]

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owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the Recorder of Deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed." Ind. Code § 32–5–11–4 (1976).

[8] "Failure to file a statement of claim within the time provided in section 4 shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

"1) was at the time of the expiration of the period provided in section four, the owner of ten or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

"2) made diligent effort to preserve all of such interests as were not being used, and did within a period of ten years prior to the expiration of the period provided in section 4 preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

"3) failed to preserve such interest through inadvertence, and;

"4) filed the statement of claim herein required, within sixty (60) days after publication of notice as provided in section seven herein *[sic]*, if such notice is published, and if no such notice is published, within sixty (60) days after receiving actual knowledge that such mineral interest had lapsed." Ind. Code § 32–5–11–5 (1976).

[9] "Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state

Two cases are consolidated in this appeal. The facts in each are stipulated. In No. 80–965, appellants include 11 parties who claim ownership of fractional mineral interests severed in 1942 and in 1944 from a 132-acre tract of land in Gibson County, Ind.; a 12th appellant is the lessee of oil and gas leases executed in 1976 and 1977 by the other appellants. The appellee is the surface owner of the 132-acre tract from which the appellants' mineral interests were carved. The parties stipulated that the appellants had not used the mineral interests for 20 years and had not filed a statement of claim within 2 years of the effective date of the statute. Thus, under the terms of the Dormant Mineral Interests Act, the mineral interests automatically lapsed on September 2, 1973, when the 2-year grace period expired. On April 28, 1977, appellee gave notice that the mineral interests had lapsed.[10] Appellants responded by filing statements of claim in the Office of the Recorder of Gibson County. Thereafter, appellee filed this action, seeking a declaratory judgment that the rights of the mineral interest owners had lapsed and were extinguished by reason of the Dormant Mineral Interests Act.

In No. 80–1018, the severed mineral estate was created on March 1, 1954. On that date, appellants Pond and Bobe conveyed land to appellees by a warranty deed that contained a reservation of the mineral estate. On June 17, 1976, Pond and Bobe executed a coal mining lease with appellant Consolidated Coal Co. The parties stipulated that, for a 20-year

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the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the Recorder of Deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given." Ind. Code § 32–5–11–6 (1976).

[10] Appellee published a "notice of lapse of mineral interest" in the Star Echo, a newspaper published at Owensville, Ind. On May 6, 1977, appellee mailed a similar notice to each of the appellants, except the oil and gas lessee.

period following the creation of the mineral estate, appellants did not use the interest or file a statement of claim in the Recorder's Office. Thus, on March 1, 1974, a date more than two years after the effective date of the Dormant Mineral Interests Act, a statutory lapse occurred. On March 4, 1977, appellees gave notice of the lapse, both by letter to the appellants and by publication in the Princeton Daily Clarion. The parties jointly filed the instant lawsuit on January 12, 1978, to resolve their conflicting claims to the mineral rights.

In each case it is agreed that if the statute is valid, appellants' mineral interests have lapsed because of their failure to produce minerals, pay taxes, or file a statement of claim within the statutory period. In neither case does the agreed statement of facts indicate whether any of the appellants was aware of the enactment of the Mineral Lapse Act, or of its possible effect on his mineral interests, at any time after the enactment of the statute and before the appellees published notice of the lapse of the mineral estates.

At all stages of the proceedings, appellants challenged the constitutionality of the Dormant Mineral Interests Act. Appellants claimed that the lack of prior notice of the lapse of their mineral rights deprived them of property without due process of law, that the statute effected a taking of private property for public use without just compensation, and that the exception contained in the Act for owners of 10 or more mineral interests denied them the equal protection of the law; appellants based these arguments on the Fourteenth Amendment of the United States Constitution.[11] Appellants also

[11] The Fourteenth Amendment provides in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment prohibition against the taking of private property for public use without just compensation applies against the States through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 160.

contended that the statute constituted an impairment of contracts in violation of Art. I, § 10, of the Constitution.[12] The state trial court held that the statute deprived appellants of property without due process of law, and effected a taking of property without just compensation.[13]

On appeal, the Indiana Supreme Court reversed. The court first explained the purpose of the Mineral Lapse Act:

> "The Act reflects the legislative belief that the existence of a mineral interest about which there has been no display of activity or interest by the owners thereof for a period of twenty years or more is mischievous and contrary to the economic interests and welfare of the public. The existence of such stale and abandoned interests creates uncertainties in titles and constitutes an impediment to the development of the mineral interests that may be present and to the development of the surface rights as well. The Act removes this impediment by returning the severed mineral estate to the surface rights owner. There is a decided public interest to be served when this occurs. The extinguishment of such an interest makes the entire productive potential of the property again available for human use." —— Ind., at ——, 406 N. E. 2d, at 627.

The court rejected the argument that a lapse of a vested mineral interest could not occur without affording the mineral owner prior notice and an opportunity to be heard. The court noted that "[p]rior to any extinguishment the owner of an interest will have had notice by reason of the enactment itself of the conditions which would give rise to an extinguishment and at a minimum a two-year opportunity to prevent those conditions from occurring by filing a statement of

[12] "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligations of Contracts, or grant any Title of Nobility."

[13] App. to Juris. Statement in No. 80–965, p. A–14; App. to Juris. Statement in No. 80–1018, p. A–16.

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claim."[14] The Indiana Supreme Court also rejected the argument that the statute effected a taking without just compensation. The court reasoned that, like statutes of limitations, the Mineral Lapse Act was a permissible exercise of the police power of the State.[15] Finally, the court rejected the argument that the statute violated the Equal Protection Clause of the Fourteenth Amendment by providing a special exception for owners of 10 or more interests who, through inadvertence, failed to preserve all such interests. The court again noted that the purpose of the statute was to encourage

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[14] —— Ind., at ——, 406 N. E. 2d, at 629. The court distinguished *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, and *Bell* v. *Burson*, 402 U. S. 535, which had been relied on by the trial court, on the ground that these cases set forth notice requirements for adjudicatory proceedings, and not for a self-executing statute that uniformly affected all parties within the State.

[15] "The purposes of this Act as stated above at the beginning of this opinion are to remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources. The dependence of local economies upon the mineral recovery industry and the entire State upon limited fossil fuel resources illustrates the public nature of these purposes. The objectives are valid and similar to those served by acts of limitation and the law of adverse possession. In limiting its incursion upon mineral rights to those which have been unused in the statutory sense for as long as twenty years, and in granting a two year period of grace after the enactment of the statute to preserve interests, the Legislature adopted means which are rationally related to such objectives, and which themselves provide a reasonable time and a simple and inexpensive method, taking into consideration the nature of the case, for preserving such interests. We find that this Act is within the police power of the states and does not unconstitutionally impair the obligation of contracts." —— Ind., at ——, 406 N. E. 2d, at 630–631.

The court also rejected an argument that the statute effected a taking without compensation in violation of the State Constitution and state eminent domain theory, on the ground that the State did not acquire the mineral interests for its own use and benefit. The court emphasized that the Mineral Lapse Act does not "involve the injury to private property through conduct or activities of governmental agents or others having and exercising the power of eminent domain"; rather, the statute declares that "a lapse of a mineral interest will occur in the event of specified conditions and circumstances." *Id.*, at ——, 406 N. E. 2d, at 631.

the development of mineral interests, and held that it was rational for the Indiana Legislature to provide special protection for owners of 10 or more mineral interests since those owners are more likely to be able to engage in the actual production of mineral resources.[16]

I

Appellants raise several specific challenges to the constitutionality of the Mineral Lapse Act. Before addressing these arguments, however, it is appropriate to consider whether the State has the power to provide that property rights of this character shall be extinguished if their owners do not take the affirmative action required by the State.[17]

In *Board of Regents* v. *Roth*, 408 U. S. 564, 577, the Court stated:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

The State of Indiana has defined a severed mineral estate as a "vested property interest," entitled to "the same protection

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[16] Several State Supreme Courts, considering similar state statutes, have reached a result contrary to that of the Indiana Supreme Court. See *Wilson* v. *Bishop*, 82 Ill. 2d 364, 412 N. E. 2d 522 (1980); *Contos* v. *Herbst*, 278 N. W. 2d 732 (Minn. 1979), appeal dism'd *sub nom. Prest* v. *Herbst*, 444 U. S. 804; *Wheelock* v. *Heath*, 201 Neb. 835, 272 N. W. 2d 768 (1978); *Chicago & N. W. Transportation Co.* v. *Pedersen*, 80 Wis. 2d 566, 259 N. W. 2d 316 (1977). But see *Van Slooten* v. *Larsen*, 410 Mich. 21, 299 N. W. 2d 704 (1980).

[17] Appellants do not specifically contend that the Mineral Lapse Act is an impermissible exercise of the legislative power of the State. Appellants argue, however, that the State has irrationally required extraction in 20 years of a resource that took "a millennia to create," Brief for Appellants in No. 80–965, p. 17, and has impermissibly transferred a fee interest in property from one private party to another. *Id.*, at 26.

as are fee simple titles."[18] Through its Dormant Mineral Interests Act, however, the State has declared that this property interest is of less than absolute duration; retention is conditioned on the performance of at least one of the actions required by the Act. We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest.

From an early time, this Court has recognized that States have the power to permit unused or abandoned interests in property to revert to another after the passage of time. In *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, the Court upheld a Kentucky statute that prevented a landowner from recovering property on which the defendant had resided for more than seven years under a claim of right. The Court stated:

> "Such laws have frequently passed in review before this Court; and occasions have occurred, in which they have been particularly noticed as laws not to be impeached on the ground of violating private right. What right has any one to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?" *Id.*, at 466.[19]

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[18] See n. 5, *supra*.

[19] Much of what Justice Johnson wrote for the Court in that case is relevant today:

"It is argued, that limitation laws, although belonging to the lex fori, and applying immediately to the remedy, yet indirectly they effect a complete divesture and even transfer of right. This is unquestionably true, and yet in no wise fatal to the validity of this law. The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and to all law: it existed in a state of nature, and is only modified by society, according to the discretion of each community. What is the evidence of an individual having abandoned his rights or property? It is clear that the subject is one over which every community is at liberty to make a rule for itself . . . ." 5 Pet., at 467.

After observing that "the state of Kentucky has established the rule of

Similarly, in *Wilson* v. *Iseminger*, 185 U. S. 55, the Court upheld a Pennsylvania statute that provided for the extinguishment of a reserved interest in ground rent if the owner collected no rent and made no demand for payment for a period of 21 years.[20] Though the effect of the Pennsylvania statute was to extinguish a fee simple estate of permanent duration, the Court held that the legislation was valid.[21]

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seven years negligence to pursue a remedy," the Court noted that such a period was not unprecedented. The Court stated:

"In the early settlement of the country, the man who received a grant of land and failed, at first in three, and afterwards in five years, to seat and improve it, was held to have abandoned it: it received the denomination of lapsed land, was declared to be *forfeited* (Mercer's Abr.); and any one might take out a grant for it." *Id.*, at 467–468 (emphasis added).

[20] The Court specifically noted that, as a matter of state law, the reserved interest in ground rent had the characteristics of a fee simple estate of permanent duration. The Court described the interest as follows:

"It is defined to be a rent reserved to himself and his heirs by the grantor of land, out of the land itself. It is not granted like an annuity or rent charge, but is reserved out of a conveyance of the land in fee. It is a separate estate from the ownership of the ground, and is held to be real estate, with the usual characteristics of an estate in fee simple, descendible, devisable, alienable." 185 U. S., at 59.

[21] The Court also held that the statute could apply to interests created before the enactment of the statute, since the statute contained a reasonable grace period in which owners could protect their rights.

"It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." *Id.*, at 62–63.

The Court in *Iseminger*, *id.*, at 63, repeated the statement of Chief Justice Waite in *Terry* v. *Anderson*, 95 U. S. 628, 632–633, that "[t]his court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect."

In these early cases, the Court often emphasized that the statutory "extinguishment" properly could be viewed as the withdrawal of a remedy rather than the destruction of a right.[22] We have subsequently made clear, however, that, when the practical consequences of extinguishing a right are identical to the consequences of eliminating a remedy, the constitutional analysis is the same. *El Paso* v. *Simmons*, 379 U. S. 497, 506–507. The extinguishment of the property owners' "remedy" in *Hawkins* and *Iseminger* placed them in precisely the same position as that held by the mineral owners in the instant cases after their interests had lapsed.

The Indiana statute is similar in operation to a typical recording statute. Such statutes provide that a valid transfer of property may be defeated by a subsequent purported transfer if the earlier transfer is not properly recorded. In *Jackson* v. *Lamphire*, 3 Pet. 280, the Court upheld such a statute, even as retroactively applied to a deed that need not have been recorded at the time delivered. The Court stated:

> "It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts; such too is the power to pass acts of limitations, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time

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[22] In considering the validity of statutes such as those at issue in that case, the Court in *Iseminger* stated: "Such statutes, like those forbidding perpetuities and the statute of frauds, do not, in one sense, destroy the obligation of contracts as between the parties thereto, but they remove the remedies which otherwise would be furnished by the courts." 185 U. S., at 61. See also *Terry* v. *Anderson*, *supra*, at 634.

> and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment." *Id.*, at 290.

These decisions clearly establish that the State of Indiana has the power to enact the kind of legislation at issue. In each case, the Court upheld the power of the State to condition the retention of a property right upon the performance of an act within a limited period of time. In each instance, as a result of the failure of the property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse.

It is also clear that the State has not exercised this power in an arbitrary manner. The Indiana statute provides that a severed mineral interest shall not terminate if its owner takes any one of three steps to establish his continuing interest in the property. If the owner engages in actual production, or collects rents or royalties from another person who does or proposes to do so, his interest is protected. If the owner pays taxes, no matter how small, the interest is secure. If the owner files a written statement of claim in the county recorder's office, the interest remains viable. Only if none of these actions is taken for a period of 20 years does a mineral interest lapse and revert to the surface owner.

Each of the actions required by the State to avoid an abandonment of a mineral estate furthers a legitimate state goal. Certainly the State may encourage owners of mineral interests to develop the potential of those interests; similarly, the fiscal interest in collecting property taxes is manifest. The requirement that a mineral owner file a public statement of claim furthers both of these goals by facilitating the identification and location of mineral owners, from whom developers may acquire operating rights and from whom the county may collect taxes. The State surely has the power to condition

the ownership of property on compliance with conditions that impose such a slight burden on the owner while providing such clear benefits to the State.[23]

II

Two of appellants' arguments may be answered quickly. Appellants contend that the Mineral Lapse Act takes private property without just compensation in violation of the Fourteenth Amendment; they also argue that the statute constitutes an impermissible impairment of contracts in violation of the Contract Clause. The authorities already discussed mandate rejection of each of these arguments.

In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of his own neglect. We have concluded that the State may treat a mineral interest that has not been used for 20 years and for which no statement of claim has been filed as abandoned; it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no "taking" that requires compensation. The requirement that an owner of a property interest that has not been used for 20 years must come forward and file a current statement of claim is not itself a "taking."

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[23] In *Miller* v. *Schoene*, 276 U. S. 272, the Court upheld the power of the State of Virginia to destroy ornamental cedar trees on private property that threatened the State's thriving apple industry. The Court stated: "It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of one interest over the other. And where the public interest is involved preferment of that interest over the property interest of

Nor does the Mineral Lapse Act unconstitutionally impair the obligation of contracts. In the specific cases under review, the mineral owners did not execute the coal and oil leases in question until after the statutory lapse of their mineral rights. The statute cannot be said to impair a contract that did not exist at the time of its enactment. Appellants' right to enter such an agreement of course has been impaired by the statute; this right, however, is a property right and not a contract right. In any event, a mineral owner may safeguard any contractual obligations or rights by filing a statement of claim in the county recorder's office. Such a minimal "burden" on contractual obligations is not beyond the scope of permissible state action.[24]

III

Appellants' primary attack on the Dormant Mineral Interests Act is that it extinguished their property rights without adequate notice. In advancing this argument, appellants actually assert two quite different claims. First, appellants argue that the State of Indiana did not adequately notify them of the legal requirements of the new statute. Second, appellants argue that a mineral interest may not be extinguished unless the surface owner gives the mineral owner advance notice that the 20-year period of nonuse is about to expire. When these two arguments are considered separately, it is clear that neither has merit.

A

The first question raised is simply how a legislature must go about advising its citizens of actions that must be taken to avoid a valid rule of law that a mineral interest that has not been used for 20 years will be deemed to be abandoned. The answer to this question is no different from that posed for any

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the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." *Id.*, at 279–280 (citations omitted).

[24] See *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398; *El Paso* v. *Simmons*, 379 U. S. 497.

legislative enactment affecting substantial rights. Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply. In this case, the 2-year grace period included in the Indiana statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms. It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.[25]

It is also settled that the question whether a statutory grace period provides an adequate opportunity for citizens to become familiar with a new law is a matter on which the Court shows the greatest deference to the judgment of state legislatures. See *Jackson* v. *Lamphire*, 3 Pet., at 290; *Wilson* v. *Iseminger*, 185 U. S., at 62–63. A legislative body is in a far better position than a court to form a correct judgment concerning the number of persons affected by a change in the law, the means by which information concerning the law is disseminated in the community, and the likelihood that innocent persons may be harmed by the failure to receive adequate notice.[26]

In short, both the Indiana Legislature and the Indiana Supreme Court have concluded that a 2-year period was suffi-

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[25] As stated in *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283:

"All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it."

See also *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 243.

[26] Moreover, the adequacy of the 2-year grace period for Indiana property owners can be evaluated more reliably by the Indiana Supreme Court than by this Court.

cient to allow property owners in the State to familiarize themselves with the terms of the statute and to take any action deemed appropriate to protect existing interests. On the basis of the records in these two proceedings, we cannot conclude that the statute was so unprecedented and so unlikely to come to the attention of citizens reasonably attentive to the enactment of laws affecting their rights that this 2-year period was constitutionally inadequate. We refuse to displace hastily the judgment of the legislature and to conclude that a legitimate exercise of state legislative power is invalid because citizens might not have been aware of the requirements of the law.[27]

B

We have concluded that appellants may be presumed to have had knowledge of the terms of the Dormant Mineral Interests Act. Specifically, they are presumed to have known that an unused mineral interest would lapse unless they filed a statement of claim. The question then presented is whether, given that knowledge, appellants had a constitutional right to be advised—presumably by the surface owner—that their 20-year period of nonuse was about to expire.

In answering this question, it is essential to recognize the difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur. As noted by appellants, no specific notice need be given of an impending lapse. If there has

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[27] For these reasons, we reject the suggestion in the dissenting opinion that the Indiana statute is invalid because it does not adequately protect citizens from "the silent actions of the legislature." *Post*, at 549. This proposition is squarely at odds with the established principle that "[a]ll persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes." *Anderson National Bank* v. *Luckett*, *supra*, at 243; see n. 25, *supra*. Additional publication of the provisions of the Act—which the dissent admits would be constitutionally sufficient, see *post*, at 542–544, n. 2—was not constitutionally required.

been a statutory use of the interest during the preceding 20-year period, however, by definition there is no lapse—whether or not the surface owner, or any other party, is aware of that use. Thus, no mineral estate that has been protected by any of the means set forth in the statute may be lost through lack of notice. It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause—including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard—must be provided.

Appellants place primary reliance on our decision in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306. In that case the Court considered the constitutional sufficiency of notice given to the beneficiaries of a common trust fund of a judicial settlement of accounts by the trustee of the fund. The Court held that the notice by publication authorized by the relevant New York statute was not sufficient, since it was not reasonably calculated to apprise the beneficiaries of the pendency of the judicial proceeding. Justice Jackson, writing for the Court, stated:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*, at 313.

Specifically, the Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *id.*, at 314; the notice in *Mullane* was deficient "not because in fact it fail[ed] to reach every-

one, but because under the circumstances it [was] not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.*, at 319.

The reasoning in *Mullane* is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did or did not occur, but not to the self-executing feature of the Mineral Lapse Act. The due process standards of *Mullane* apply to an "adjudication" that is "to be accorded finality." The Court in *Mullane* itself distinguished the situation in which a State enacted a general rule of law governing the abandonment of property.[28] It has long been established that "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," *Grayned* v. *City of Rockford*, 408 U. S.

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[28] "The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left tangible property in the state either had abandoned it, in which case proceedings against it deprive him of nothing, *cf. Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Savings Bank* v. *California*, 263 U. S. 282, or that he has left some caretaker under a duty to let him know that it is being jeopardized. *Ballard* v. *Hunter*, 204 U. S. 241; *Huling* v. *Kaw Valley R. Co.*, 130 U. S. 559. As phrased long ago by Chief Justice Marshall in *The Mary*, 9 Cranch 126, 144, 'It is the part of common prudence for all those who have any interest in [a thing], to guard that interest by persons who are in a situation to protect it.'" 339 U. S., at 316.

The Court in *Mullane* emphasized that "[i]n the case before us there is, of course, no abandonment." *Ibid.*

The dissent attempts to distinguish *Mullane* on the ground that, unlike the tangible interests that the Court in that case stated could be subject to an assumption of abandonment, the present cases concern "incorporeal interests" that have not been "directly attacked, seized, possessed, used, or depleted." *Post*, at 548, 549. We do not believe, however, that the State's assumption of abandonment in these cases is improper. As the In-

104, 108, but it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights.

As emphasized above, appellants do not challenge the sufficiency of the notice that must be given prior to an adjudication purporting to determine that a mineral interest has not been used for 20 years. Appellants simply claim that the absence of specific notice prior to the lapse of a mineral right renders ineffective the self-executing feature of the Indiana statute. That claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional. The Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run, although it certainly would preclude him from obtaining a declaratory judgment that his adversary's claim is barred without giving notice of that proceeding.

Appellants also rely on a series of cases that have required specific notice and an opportunity to be heard before a driver's license is suspended for failure to post security after an accident,[29] before property is seized pursuant to a prejudgment replevin order,[30] or before service is terminated by a

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diana Supreme Court described, interests or estates in oil, gas, coal, and other minerals lying beneath the surface of the land are "interests in real estate," —— Ind., at ——, 406 N. E. 2d, at 627; oil, gas, coal, and other minerals are tangible interests that may be used and developed by a mineral owner. Moreover, the length of the period that is afforded to a mineral owner to use the interest, the variety and minimal extent of the actions that constitute a statutory use, and the length of the statutory grace period are sufficient to entitle the State to indulge in the assumption that—if no statutory use is made in a 20-year period and no statement of claim is filed in the 2-year grace period, if applicable—the mineral owner has abandoned the property. We need not decide today whether the State may indulge in a similar assumption in cases in which the statutory period of nonuse is shorter than that involved here, or in which the interest affected is such that concepts of "use" or "nonuse" have little meaning.

[29] *Bell* v. *Burson*, 402 U. S. 535.

[30] *Fuentes* v. *Shevin*, 407 U. S. 67.

public utility for failure to tender payment of amounts due.[31] In each of those cases, however, the property interest was taken only after a specific determination that the deprivation was proper.[32] In the instant case, the State of Indiana has enacted a rule of law uniformly affecting all citizens that establishes the circumstances in which a property interest will lapse through the inaction of its owner. None of the cases cited by appellants suggests that an individual must be given advance notice before such a rule of law may operate.[33]

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[31] *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1.

[32] The nature of the state determination in *Fuentes* and *Craft* is clear. While less so in *Bell*, the Court specifically noted in that case:

"The main thrust of Georgia's argument is that it need not provide a hearing on liability because fault and liability are irrelevant to the statutory scheme. We may assume that were this so, the prior administrative hearing presently provided by the State would be 'appropriate to the nature of the case.' *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). But '[i]n reviewing state action in this area . . . we look to substance, not to bare form, to determine whether constitutional minimums have been honored.' *Willner* v. *Committee on Character*, 373 U. S. 96, 106–107 (1963) (concurring opinion). And looking to the operation of the State's statutory scheme, it is clear that liability, *in the sense of an ultimate judicial determination of responsibility*, plays a crucial role in the Safety Responsibility Act." 402 U. S., at 541 (emphasis supplied).

[33] The dissenting opinion places almost exclusive reliance on broad language in *Lambert* v. *California*, 355 U. S. 225. As the dissent itself admits, however, see *post*, at 547, n. 4, *Lambert* does not control the disposition of these cases. The Court in *Lambert* considered the validity of an ordinance that made it a criminal offense for a convicted felon to remain in the city of Los Angeles for five days without registering with the Chief of Police. The Court held:

"We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. As Holmes wrote in The Common Law, 'A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.'" 355 U. S., at 229.

Lambert concerns the *mens rea* that is necessary before the State may convict an individual of crime. See *United States* v. *Freed*, 401 U. S. 601; *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558. Its application has been limited, lending some credence to Justice Frank-

We have held that the State may impose on an owner of a mineral interest the burden of using that interest or filing a current statement of claim. We think it follows inexorably that the State may impose on him the lesser burden of keeping informed of the use or nonuse of his own property. We discern no procedural defect in this statute.[34]

IV

The Indiana statute allows a mineral owner to retain an interest, notwithstanding a failure to file a statement of claim within the statutory period, if he satisfies four specific conditions: (1) he must own at least 10 mineral interests in the county; (2) he must have made a diligent effort to preserve all his interests and have succeeded in preserving some; (3) his failure to preserve the interest in question must have been

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furter's colorful prediction in dissent that the case would stand as "an isolated deviation from the strong current of precedents—a derelict on the waters of the law." 355 U. S., at 232.

[34] The dissenting opinion suggests that as a practical matter notice must precede any attempt to develop a lapsed mineral estate, see *post*, at 553–554, and that there is thus no reason not to require notice in advance of the lapse itself. This suggestion ignores the fact that, independent of the interest in facilitating the development of mineral rights, the State has an interest in eliminating fractured mineral estates that were created long ago, have been unused for the statutory period, and create uncertainties in title records. As stated by the Indiana Supreme Court, "[t]he purposes of this Act . . . are to remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources." —— Ind., at ——, 406 N. E. 2d, at 630. The State legitimately may treat a mineral interest that has been unused for the statutory period and for which the owner has not bothered to file a statement of claim as worthless and abandoned; the State has an interest in eliminating such encumbrances from title records. Moreover, if a mineral interest has been inactive for a sufficient period of time, a developer may well decide that notice is entirely unnecessary. Title opinions and title insurance, based normally on a thorough search of county records, may be sufficient to assure a potential developer that an ancient and dormant mineral estate, like other possible clouds on title, is without legal significance. In any event, the question in these cases is whether additional notice is constitutionally required, and not whether such notice might better serve the purposes of the statute.

through "inadvertence"; and (4) he must file a statement of claim within 60 days after receiving notice that the mineral interest has lapsed.[35] Appellants contend that this special exception violates the Equal Protection Clause of the Fourteenth Amendment.

There is nothing in the records to tell us how often, if ever, this statutory exception has been invoked. Nor do the records indicate the number of persons who own 10 or more interests in any one county in Indiana. Since mineral interests may be bought and sold like other property, and often have little value, the composition of the class benefited by this exception is subject to constant change. Unlike those classes that are defined by personal characteristics, anyone who purchases 10 fractional mineral interests in the same county, of whatever value, can join this favored class.

Although appellants do not suggest that they are financially unable to join the special class, or that its existence has any adverse impact on their own rights—or indeed that excision of the exception from the Act would provide them with any benefit whatsoever—they nevertheless argue that it is basically unfair to treat owners of multiple interests more favorably than they are treated. The Indiana Supreme Court has explained, however, that the State has an interest in encouraging the assembly of multiple interests in a single ownership because such owners are more likely to be able to engage in the actual production of mineral resources.[36] This

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[35] See n. 8, *supra*.

[36] "Minerals exist within the earth in strata and formations which do not necessarily coincide with the manner in which man has chosen to divide the surface area. Consequently it is commonly necessary to assemble several mineral interests in order to render the extraction of minerals safe and profitable. The Legislature could reasonably have concluded that those meeting the criteria set forth above include those most likely to assemble such interests and actually produce minerals. The separate classification of interests so held within these essential clusters is rationally related to the legitimate objectives of the enactment and is consequently not contrary to the requirements of state and federal equal protection." —— Ind., at ——, 406 N. E. 2d, at 631–632.

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state interest is unquestionably legitimate. Thus, a statutory provision that encourages multiple ownership—by giving that kind of ownership additional protection against forfeiture after it has been assembled—is related to the central purpose of the statute. Since the exception furthers a legitimate statutory purpose, and has no adverse impact on persons like the appellants who own fewer mineral interests, the exception does not violate the Equal Protection Clause of the Fourteenth Amendment.

The judgment of the Supreme Court of Indiana is affirmed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE POWELL join, dissenting.

There is no measurable dispute in these cases concerning Indiana's power to control, define, and limit interests in land within its boundaries. Nor is there any question that Indiana has a legitimate interest in encouraging the productive use of land by establishing a registration system to identify the owners of mineral rights. Nor indeed is there any question that extinguishment of a mineral owner's rights may be an appropriate sanction for a failure to register. The question presented here is simply whether the State of Indiana has deprived these appellants of due process of law by extinguishing their pre-existing property interests without regard to whether they knew, and without providing any meaningful mechanism by which they might have learned, of the imminent taking of their property or their obligations under the law.

I

The State of Indiana has historically afforded owners of incorporeal interests in minerals all the protections and privileges enjoyed by any owner of an estate in land held in fee simple. The mineral interests of the appellants here were thus assuredly within the scope of the dual constitutional guarantees that there be no taking of property without just

compensation, and no deprivation of property without the due process of law. By the statute at issue in these cases, Indiana has imposed upon the owners of mineral interests the requirement that they pay taxes, or put their interest to productive use, or make their identity known by filing a statement of claim every 20 years. If the mineral interest owner fails to comply with these conditions, his interest is extinguished, and the mineral rights in the land are, by operation of law, merged with the surface estate, to the benefit of the surface owner.[1]

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[1] Indiana Code § 32–5–11–1 (1976) provides that

"Any interest in coal, oil, and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five [32–5–11–5] hereof, and the ownership shall revert to the then owner of the interest out of which it was carved."

A mineral interest is deemed "used" for the purposes of the statute

"when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument." Ind. Code § 32–5–11–3 (1976).

With respect to the statement of claim, the statute specifies the relevant time limits:

"The statement of claim provided in section one above [32–5–11–1] shall be filed by the owner of the mineral interest prior to the end of the twenty year period set forth in section two [one] [32–5–11–1] or within two years after the effective date [September 2, 1971] of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the Recorder of Deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed." Ind. Code § 32–5–11–4 (1976).

As to one class of mineral interest owners, there is no question that the statute is a constitutionally proper exercise of the State's power. Every mineral interest in land carved from the fee after the effective date of the statute was carved subject to the statute's limitations. In *prospective* application the statute simply provides that any instrument purporting to transfer a mineral interest carries with it the implicit condition that unless the transferee uses the land within the meaning of the statute, his interest will revert to the transferor. It is only where the State seeks to change the fundamental nature of a property interest already in the hands of its owner that the operative restrictions of both the Takings Clause and the Due Process Clause come into play.

If Indiana were by simple fiat to "extinguish" all preexisting mineral interests in the State, or to transfer those interests to itself, to surface owners, or indeed to anyone at all, that action would surely be unconstitutional and unenforceable—at least absent just compensation. That is not the case here for, as the Court points out, *ante*, at 529, 531, the State has offered the owner of a mineral interest several options by which he may preserve his interest, and a grace period in which he may do so. Because the State has provided these options, the Court concludes that there has been no unconstitutional deprivation of property: "It is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right . . . ." *Ante*, at 530. The Court disdains any serious consideration of whether the saving options afforded by the State are in any meaningful way within the reach of the mineral interest owners.[2] In this respect the Court errs, for the Due Process

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[2] In an attempt to support its refusal seriously to inquire into the adequacy of the protections afforded mineral interest owners by which they might preserve their property, the Court analogizes the Indiana statute to a Recording Act and draws on the pre-Fourteenth Amendment case of *Jackson* v. *Lamphire*, 3 Pet. 280 (1830). *Ante*, at 528–529, 532. The Court's reliance is misplaced. In *Jackson* v. *Lamphire*, *supra*, we recognized that the manner of implementing a Recording Act is to be left to the

Clause of the Fourteenth Amendment requires the Court to make precisely the inquiry the Court avoids. As we have noted:

> "It does not follow, however, that what [a State] can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 16–17 (1976).

There is much to be said for the maxim upon which the Court places its principal reliance in upholding the retrospective application of this statute: that each citizen may be

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discretion of the legislature in the first instance. But we also recognized the natural limits of that legislative authority.

"The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. *Cases may occur where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right, and call for the interposition of the court; but the present is not one.*" *Id.*, at 290 (emphasis added).

It is not at all surprising that we did not find the exercise of legislative authority in *Jackson* v. *Lamphire* unreasonable. In 1797, the New York Legislature established a Commission to settle competing claims to land within a particular county. The New York Act provided a 2-year period, following the action of the Commission, in which any party adversely affected might dissent and preserve his right to recover his title. *Id.*, at 282–283. In addition, before the Commission could act, *the New York legislation required precisely those forms of notice that appellants in these cases complain are lacking in the Indiana statute.* The Commission was expressly charged with the responsibility of notifying the populace that it was convening to resolve disputes concerning land within the county. *Id.*, at 283. The New York Act further provided that

"in all cases where there are filed or recorded . . . two or more deeds from one and the same person, or in the same right to different persons, *if any person interested under either of them shall neglect to make his claim, and in all cases where several persons appear to have claims to one and the*

charged with knowledge of the law.[3] The justification for that rule is its necessity. As a practical matter, a State cannot afford notice to every person who is or may be affected by a change in the law. But an unfair and irrational exercise of state power cannot be transformed into a rational exercise merely by invoking a legal maxim or presumption. If it is to survive the scrutiny that the Constitution requires us to afford laws that deprive persons of substantial interests in property, an enactment that relies on that presumption of knowledge must evidence some rational accommodation between the interests of the State and fairness to those against whom the law is applied. Cf. *Vlandis* v. *Kline*, 412 U. S. 441 (1973). By acknowledging that there is some limit to the exercise of legislative power to transform the interests of persons in property, we do not depart from the principle of utmost deference to the judgment of the legislature to reach those accommodations in the first instance. But the Constitution puts even our most cherished legal maxims and presumptions to the test of fairness and rationality in light of common experience. "[I]n passing on the constitutionality of a state law, its effect must be judged in the light of its practi-

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same piece of land, and any of them do not appear before the said commissioners, they shall cause a notice to be published in the newspapers aforesaid, and continued for six weeks, requiring all persons interested in such land to appear at a certain time and place therein mentioned, not less than six months from the date of such notice, and exhibit their claims to the same land." *Id.*, at 284 (emphasis added).

If the Indiana statute at issue in these cases provided a 2-year period in which mineral interest owners could assert their interests, *following* notice by publication, as provided in the New York Act at issue in *Jackson* v. *Lamphire*, I would readily agree that the Indiana statute was reasonable even as applied to existing mineral interests. Absent such notice, the 2-year grace period provided by Indiana is constitutionally meaningless.

[3] Despite suggestive references to cases involving abandonment of property, *ante*, at 526–528, the Court does not rest on the argument that failure to comply with the provisions of the Indiana statute implies abandonment. Nor could the Court so rest. The very cases cited by the Court demon-

cal application to the affairs of men as they are ordinarily conducted." *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283 (1925).

Thus, we have recognized certain very limited circumstances in which a State's reliance on the maxim that a man may be presumed to know the law is not consistent with the restrictions imposed by the Constitution on legislative action. In *Lambert* v. *California*, 355 U. S. 225 (1957), a municipal ordinance made it an offense for any convicted felon to remain in the city of Los Angeles for more than five days without registering with the police. We held that the ordinance, which purported to deprive a person of liberty for failing to register, could not be applied to a person who neither knew, nor could reasonably have been expected to know, of his legal obligation. As we noted:

> "[W]e deal here with conduct that is wholly passive—mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that

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strate that the finding of abandonment with respect to rights in land has historically been associated with the property owner's failure to pursue legal remedies over the course of some legislatively established period of time. See *Wilson* v. *Iseminger*, 185 U. S. 55 (1902); *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, 466–467 (1831). The mineral interest owners in these cases plainly have not been derelict in pressing their rights. Until their interests were extinguished "by operation of law" they simply had no occasion to pursue any legal action. Moreover, that mineral interest owners may have failed to exploit their interest for 20 years, during which period it may not have been economically feasible to extract minerals from the property, and during which period there was no statutory obligation to use the interest in any manner, does not suggest abandonment. Cf. *Provident Savings Institution* v. *Malone*, 221 U. S. 660, 664 (1911). Nor can the intent to abandon, or any independent state interest supporting the Indiana statute, be found in appellants' failure to pay taxes. At no time have taxes been separately assessed with respect to the reserved mineral interest in No. 80–1018. App. in No. 80–1018, p. 7. While the record is slightly more ambiguous with respect to No. 80–965, appellees conceded at oral argument that the counties of Indiana generally do not assess taxes on mineral interests that are neither in use nor in the process of development. Tr. of Oral Arg. 25.

should alert the doer to the consequences of his deed. The rule that 'ignorance of the law will not excuse' is deep in our law, as is the principle that of all the powers of local government, the police power is 'one of the least limitable.' On the other hand, due process places some limits on its exercise. Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. *Notice is required before property interests are disturbed*, before assessments are made, before penalties are assessed. *Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. . . .*

"Registration laws are common and their range is wide. Many such laws are akin to licensing statutes in that they pertain to the regulation of business activities. But the present ordinance is entirely different. *Violation of its provisions is unaccompanied by any activity whatever*, mere presence in the city being the test. Moreover, *circumstances which might move one to inquire as to the necessity of registration are completely lacking. . . . [T]his appellant on first becoming aware of her duty to register was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent.*" *Id.*, at 228–229 (emphasis added) (citations omitted).

There is, of course, no general requirement that a State take affirmative steps to inform its citizenry of their obligations under a particular statute before imposing legal sanctions for violation of that statute. *Lambert* suggests no such general requirement. Rather, that case highlights the limited circumstances in which the State's reliance on a presumption of knowledge strains the constitutional requirement that the liberty and property of persons be dealt with fairly and rationally by the State. The State's power to impose sanctions on individuals is to be tested in part against the rationality of the proposition that those individuals were

or could have been aware of their legal obligations. The present cases, like *Lambert*, involve the necessity of notice in the context of a registration statute sufficiently unusual in character, and triggered in circumstances so commonplace, that an average citizen would have no reason to regard the triggering event as calling for a heightened awareness of one's legal obligations.[4]

The opinion of the Court suggests that the presumption of knowledge of the law is not unreasonable in cases such as these because it is a customary feature of property ownership that the landowner monitor the Acts of the legislature that may affect his interest. *Ante*, at 532. The Court would appear to treat property owners as businessmen, of whom we do indeed expect the greatest attentiveness to regulatory obligations in the conduct of their business affairs. But neither our cases nor our experience supports the Court's supposition about the diligence reasonably expected of property owners. Property owners have historically been allowed to rest easy in the knowledge that their holding is secure, absent some affirmative indication to the contrary; to rely on the general practice that "[n]otice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere fail-

[4] Because *Lambert* involved the imposition of *criminal sanctions*, giving rise to a rigor in the application of due process standards that would be inappropriate where only interests in property are at stake, it cannot control the disposition here. But the rigor with which the due process test was applied in *Lambert* is worth noting. The city's interest in that case lay in identifying felons within its boundaries. The ordinance failed for want of notice. But it is difficult to conceive how the city might have contrived an ordinance, effecting the same purpose, short of informing every person who entered the city that if he was a convicted felon he was obliged to register with the police. Because it was the singular purpose of the city to identify felons, individualized notice was simply incompatible with the legislative purpose. Nevertheless, we held the ordinance unenforceable. As will be noted below, the requirement of prior notice with respect to the registration scheme at issue in these cases, does not limit the ability of the State to further its asserted objectives. See *infra*, at 551–554.

ure to act." *Lambert* v. *California*, 355 U. S., at 228. Surely no contrary understanding of the obligations of property ownership could be attributed to the mineral interest owners of Indiana. It was their historic complacency, heretofore undisturbed by statutory obligation, that prompted the State of Indiana to install the regulatory regime at issue here.

The Constitution does, of course, permit the interests of a property owner to be adversely affected upon notice less exacting than those mechanisms of notification deemed minimally acceptable in other contexts. But the rationale for this standard of "lesser notice" with respect to matters involving land bears restating for the contrast that it presents with the circumstances of these cases:

> "[P]ublication traditionally has been acceptable as notification *supplemental* to other action which in itself may reasonably be expected to convey a warning. The ways of an owner with *tangible property* are such that he usually arranges means to learn of any *direct attack* on his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left *tangible* property in the state either has abandoned it, in which case proceedings against it deprive him of nothing, or that he has left some caretaker under a duty to let him know that it is being jeopardized." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 316 (1950) (emphasis added; citations omitted).

It may be reasonable to expect property owners to maintain sufficient awareness of their property to mark those situations in which the property is physically disturbed with some scrutiny of their duties and obligations under the law. The owners of the incorporeal interests at issue here are

hardly in a similar situation. There is no event or circumstance to which they might have turned their powers of observation; nothing has been directly attacked, seized, possessed, used, or depleted. The only "caretaker" who could have guarded the interest of appellants from the silent actions of the legislature and the surface owner, is a caretaker charged with the responsibility of daily surveillance over happenings in the state legislature. In light of "the affairs of men as they are ordinarily conducted," a State may not constitutionally attribute to each citizen the foresight, or the continuing duty, to maintain a lobbyist in the state capital in order to guard his property from extinguishment.

The Court also relies on cases involving the application of legislatively foreshortened limitations periods to causes of actions that have already vested. *Ante*, at 532. But those cases illustrate, rather than refute, the constitutional principle that reliance on the maxim of presumed knowledge of the law is limited by the reasonableness of applying that maxim in a particular class of cases. The Court has upheld retroactive adjustments to a limitations period only when the legislature has provided a grace period during which the potential plaintiff could reasonably be expected to learn of the change in the law and then initiate his action. In the context of a retrospective statute of limitations, a reasonable grace period provides an adequate guarantee of fairness. Having suffered the triggering event of an injury, a potential plaintiff is likely to possess a heightened alertness to the possibly changing requirements of the law bearing on his claim. Because redress necessarily depends on recourse to the State's judicial system, the State is free to condition its intervention on rules of procedure, and further, to impose on the potential plaintiff the obligation to monitor changes in those rules. Plaintiffs, and their attorneys, are so aware.

The situation of appellants here is not at all similar. The statute does not operate upon the dormant mineral interest owner after he has suffered some direct affront to his property such that he might reasonably be called upon to increase

his awareness of his legal obligations. The mineral interest owner has not been derelict in pressing rights against third parties such that the State may reasonably assume he has abandoned his interest. The mineral interest owner has no reason to anticipate an occasion for state assistance, and thus no reason to monitor the ground rules upon which the State conditions its aid. In these cases the State has taken the initiative in seeking to regulate heretofore unregulated incorporeal interests in land under circumstances in which a need for heightened attentiveness to the law cannot reasonably be apprehended by the mineral interest owner. In these circumstances, the empirical foundation of the assertion that passage of a statute will create knowledge of its provisions is at its weakest.

This does not end the inquiry, for the State may have an identifiable interest in not making provision for notice in a particular circumstance. If there were such an interest, the Constitution would not lightly supplant the legislative judgment. I thus turn to the asserted interests of the State in the procedure established here.

II

It is plain that that sheer impracticality makes it implausible to expect the State *itself* to apprise its citizenry of the enactment of a statute of general applicability. The State may, however, feasibly provide notice when it asserts an interest directly adverse to particular persons, and may in that circumstance be constitutionally compelled to do so. That is not the situation presented in these cases, for the mineral interest owner's failure to comply with the statute results in neither a fine nor an escheat. Rather, his interest is effectively transferred to the surface owner. While the State is not disinterested, as a policy matter, in whether the mineral interest owner files a notice of claim, it sanctions a failure to comply by adjusting the relative rights of the mineral interest owner as against another citizen. In this context it is

again helpful to examine—and contrast—the reasons supporting the lack of notice in the context of retrospectively applied limitations periods.

First, statutes of limitations "are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945). The very interest asserted by the State in imposing a statute of limitations—avoiding trial of stale claims—would be defeated by extending the time in which the plaintiff may bring his suit until such time as he may learn of the existence of the statute or the fact that it may soon run. In addition, with respect to statutes of limitations, pre-expiration notice is, as a practical matter, impossible: The potential defendant may not be aware of the potential plaintiff's injury, let alone the plaintiff's future intention to sue. Under these circumstances the potential defendant cannot be expected to monitor the law on behalf of his future—perhaps unknown—adversary. In sum, a State need not make provision for notice with respect to the retroactive application of a statute where it would defeat a legitimate State interest, or would be infeasible in the context of the statutory scheme.

In these cases, Indiana asserts an interest in ensuring the productive use of land within its boundaries, and particularly in promoting the exploitation of land containing energy resources such as coal, gas, and oil. The existence of stale and abandoned mineral interests impedes the development of those mineral resources, and hinders the development of the surface as well, by preventing the willing buyer from making contact with a willing seller. To facilitate the operation of the market with respect to mineral development, Indiana has required, by the statute at issue here, that the mineral interest owner file a statement of his claim once every 20 years, or suffer extinguishment of his unused interest. This minimal burden on the mineral rights owner is intended to ensure that

the interest owner is identifiable, and thus suffices to maintain his accessibility to potential purchasers. Should the notice not be filed, the State's interest in identification is equally well served: the surface owner, presumably identified readily by virtue of his interest in a parcel of tangible property, becomes the beneficiary of the mineral interest owner's default. By facilitating identification of the owners of the mineral interest, the statute permits the willing buyer—presumably someone who *would* wish to put the land to productive use—to locate the presumably willing seller, and thus reach the type of deal that could lead to an economically productive use of the land. With respect to the treatment of mineral interest owners, such as appellants here, whose 20-year period had run or partially run as of the date of the enactment, the State's interest is no different. Although the operative period may be abbreviated, the State seeks only to ensure either use, or identification.

It is difficult to conceive how the State's interest is served by *not* requiring the surface owner to notify the mineral rights owner before taking title to his interest; I do not understand either the private appellees, or the State of Indiana as intervenor, to identify any affirmative state interest in failing to provide for pre-extinguishment notice. It might be supposed that a requirement of pre-extinguishment notice by the surface owner would present an untoward economic burden on the surface owner that would impede the purposes of the statute or would otherwise be inconsistent with the statutory framework. But it is plain on the face of the statute that this is not so.

Although the statute is self-executing as to one class of mineral interest owners, notice is required before the interests of another class of mineral interest owners are terminated. If the mineral interest owner is one who owns 10 mineral interests in the county and has made diligent effort to preserve his interest, and his failure to preserve is inadvertent, he is afforded the opportunity to file a statement of claim "within sixty (60) days after publication of notice as

provided in section seven [32–5–11–7] herein, if such notice is published, and if no such notice is published, within sixty (60) days after receiving actual knowledge that such mineral interest had lapsed."[5] Ind. Code § 32–5–11–5(4) (1976). The person charged with the *responsibility* of providing notice by publication to a holder of 10 interests or more, is, of course, the surface owner. And indeed, the statute sets forth explicitly the manner in which such notice by publication is to be made:

> "Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the Recorder of Deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given." Ind. Code § 32–5–11–6 (1976).

Because no surface property owner could claim clear title to the mineral interest absent such notice—or else a potential purchaser would suffer the possibility that some holder of 10

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[5] It may be, as the Court holds, that the State may rationally prefer the holders of 10 interests to those who hold less, and that the holders of more numerous claims may thus be afforded special protections. The distinction drawn between the two classes of holders would thus survive the scrutiny of the Equal Protection Clause. The Court opinion fails, however, to identify any state interest in denying notice to a holder of less than 10 interests in the first instance.

or more interests might later come forward to claim his rights—such notice is, in practical operation, likely to be provided in every case. The only difficulty is that as construed by the Court today, the statutory notice comes too late for mineral interest holders in the position of appellants to assert their continued interest in their property rights. Because it is clear to me that a form of pre-extinguishment notice, procedurally comparable to that statutorily provided with respect to owners of 10 interests or more, is entirely consistent with the asserted legislative purpose, I would hold that such notice was constitutionally required before a person, otherwise without notice of his obligations under the statute, might be deprived of his property "by operation of law."

III

In the exercise of a State's police powers, and perhaps particularly with respect to matters involving the regulation of land, we owe the judgments of state legislatures great deference. Nevertheless, the Due Process Clause of the Fourteenth Amendment was designed to guard owners of property from the wholly arbitrary actions of state governments. As applied retrospectively to extinguish the rights of mineral interest owners for their failure to have made use of their interests within a prior 20-year period, Indiana's statutory scheme would likely effect an unlawful taking of property absent the proviso that such mineral interest owners could preserve their rights by filing a notice of claim within the 2-year grace period. Given the nature of the scheme established, there is no discernible basis for failing to afford those owners such notice as would make the saving proviso meaningful. As applied to mineral interest owners who were without knowledge of their legal obligations, and who were not permitted to file a saving statement of claim within some period following the giving of statutory notice by the surface owner, the statute operates unconstitutionally. In my view, under these circumstances, the provision of no process simply cannot be deemed due process of law. I respectfully dissent.

Syllabus

UNITED STATES v. CLARK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 80–1121. Argued November 3, 1981—Decided January 12, 1982

There are two principal pay systems for federal employees: (1) The General Schedule (GS), which applies to "white-collar" employees and which is divided into numbered pay grades and subdivided into rates of pay or "steps" within each grade, with the salary for each "step" uniform nationwide; and (2) the prevailing wage system (WS), which primarily applies to "blue-collar" employees specifically excluded from GS, and which is also divided into grades and subdivided into "steps," with the rates of pay for each "step" based upon prevailing wage rates for comparable work in local areas. Salary treatment for employees shifted or hired into the GS system is governed by 5 U. S. C. § 5334 and implementing regulations. An employee's salary after promotion is determined by reference either to the "highest previous rate" rule under § 5334(a) and the governing regulation or to the "two-step increase" rule under § 5334(b), which provides for such an increase when an employee is promoted to a position in a higher "grade." Title 5 U. S. C. § 5331 assigns the word "grade" the meaning given by § 5102(a)(5), which in turn defines the word as those positions sufficiently similar to warrant their inclusion within one range of rates of basic pay "in the General Schedule." Respondents, after being promoted from WS to GS positions, were administratively held to be entitled to a salary increase determined by the "highest previous rate" rule, which gave them a smaller increase than they would have received under the "two-step increase" rule. They then filed an action in the Court of Claims, contending that they were entitled to a two-step increase in pay pursuant to § 5334(b). The Court of Claims upheld their claim and accordingly invalidated a regulation which construed § 5334(b) as limited to transfers or promotions within the GS.

Held: Section 5334(b) does not apply to WS employees promoted to GS positions. Pp. 560–567.

(a) Giving § 5334(b) its plain meaning, when an employee is promoted to a position in a higher grade "in the General Schedule," he is entitled to pay which exceeds by two step increases his pay in the grade "in the General Schedule" from which he was promoted. Absent statutory language indicating that Congress intended to include employees promoted from WS to GS within § 5334(b)'s two-step requirement, the statute reveals an intent to apply such requirement only to promotions of employees already within the GS system. Pp. 560–561.

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(b) Although the legislative history does not expressly indicate that Congress intended to limit § 5334(b) and its predecessor to GS employees, the history does provide ample indication that such was Congress' intent. Pp. 561–565.

(c) Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed consistently over a long period of time. Here, the agency responsible for proposing and administering § 5334(b) has consistently construed it to apply only to promotions within the GS. Pp. 565–566.

220 Ct. Cl. 278, 599 F. 2d 411, reversed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Alan I. Horowitz argued the cause for the United States. On the briefs were *Solicitor General Lee*, former *Solicitor General McCree*, *Acting Assistant Attorney General Martin*, *Deputy Solicitor General Geller*, *Mark I. Levy*, *Mark H. Gallant*, and *Harvey J. Wilcox*.

John I. Heise, Jr., argued the cause for respondents. With him on the brief was *Samuel Resnicoff*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

The issue in this case is whether 5 U. S. C. § 5334(b), which requires a two-step pay increase for federal employees "promoted . . . to a position in a higher grade," applies to prevailing wage rate employees promoted to General Schedule positions. We hold that it does not apply, and reverse the judgment of the Court of Claims.

I

This case involves the relationship between the two principal pay systems for federal employees and the pay treatment to which an employee moving from one system to another is entitled. Both systems are governed by Title 5, United States Code.

One of the pay systems, the General Schedule (GS), 5 U. S. C. § 5331 *et seq.* (1976 ed. and Supp. V), applies to federal "white-collar" employees. See R. Vaughn, Principles

**Edward J. Hickey, Jr.*, and *Thomas A. Woodley* filed a brief for the Public Employee Department, AFL–CIO, as *amicus curiae* urging affirmance.

of Civil Service Law § 6.2(a), p. 6–4 (1976) (hereinafter Vaughn). The GS is divided into 18 numbered grades; as the number of the grade increases, so do pay and responsibilities. §§ 5104 and 5332 (1976 ed. and Supp. V). The grades are subdivided into rates of pay or "steps." § 5332. The salary for each step of each grade in the GS is uniform nationwide.[1]

The second principal pay system is the prevailing rate wage system (WS), 5 U. S. C. § 5341 *et seq.* (1976 ed. and Supp. V), which primarily applies to those federal "blue-collar" employees specifically excluded from the GS. See §§ 5102(b), (c)(7), 5331, and 5342(a)(2)(A); Vaughn § 6.2(b), p. 6–17. The WS also is divided into grades and subdivided into "steps." The rate of pay for each step within each grade is based upon wage surveys of prevailing rates for comparable work in local wage areas. § 5343 (1976 ed. and Supp. V); Office of Personnel Management, Federal Personnel Manual, Supp. 532–1, 56 (Apr. 14, 1980) (hereinafter FPM). Pay rates for positions within the WS thus vary from one locale to another.

Salary treatment for GS employees who change their employment status and employees shifted or hired into the GS system is governed by 5 U. S. C. § 5334 (1976 ed. and Supp. V) and regulations promulgated pursuant thereto. Under the statute, an employee's salary after promotion is determined by reference either to the "highest previous rate" rule[2] or to the "two-step increase" rule.[3]

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[1] The Federal Pay Comparability Act of 1970, 5 U. S. C. § 5301 *et seq.* (1976 ed. and Supp. V), defines the principles applied to determine GS salaries.

[2] The "highest previous rate" rule derives from 5 U. S. C. § 5334(a) (1976 ed., Supp. V), which provides in part:

"The rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Office of Personnel Management [formerly the Civil Service Commission] in conformity with this subchapter and chapter 51 of this title when—

(1) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter does not apply;

. . . . . .

(6) his employment status is otherwise changed; or

[Footnote 3 is on p. 558]

Prior to July 1973, all six respondents worked as federal civilian employees for the Supervisor of Shipbuilding, Department of the Navy. In those positions, they were paid pursuant to the WS. Between July 1973 and October 1974, all were promoted to positions covered by the GS.[4] After his promotion, Libretto learned that the other respondents received a salary increase equivalent to a two-step pay increase on their appointment to the GS positions.[5] Since Li-

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(7) his position is changed from one grade to another grade."

At the time of respondents' promotions, 33 Fed. Reg. 12450 (1968), 5 CFR § 531.203(c) (1969), one of the regulations prescribed by authority of § 5334(a), provided in part:

"Subject to § 531.204 . . . , when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay him at any rate of his grade which does not exceed his highest previous rate; however, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate."

[3] The "two-step increase" rule is codified in 5 U. S. C. § 5334(b) (1976 ed., Supp. V), which provides in pertinent part:

"An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred."

At the time of respondents' promotions, 33 Fed. Reg. 12450 (1968), 5 CFR § 531.204(a)(1) (1969), the regulation interpreting § 5334(b), provided:

"'The requirements of section 5334(b) of title 5, United States Code, apply only (i) to a transfer from one General Schedule position to a higher General Schedule position, and (ii) to a promotion from one General Schedule grade to a higher General Schedule grade."

[4] Respondents' changes of position were as follows: Clark, from WS ship surveyor (shipfitter) to GS quality assurance specialist; D'Aversa, from WS ship surveyor (pipefitter) to GS production controller; Libretto, from WS ship surveyor (machinist) to GS engineering technician; Proto, from WS ship surveyor (electrician) to GS production controller, and later to GS contract negotiator; Scialpi, from WS ship surveyor (shipfitter) to GS contract negotiator; and Wolfus, from WS ship surveyor (machinist) to GS contract negotiator.

[5] The parties agree that Libretto's salary after promotion was determined by reference to the "highest previous rate" rule. Because his WS salary fell between two steps of his new GS grade, he was given the higher

bretto's increase was based upon the "highest previous rate" rule and was much smaller, he filed a claim with the Department of the Navy. As a result, the Navy reexamined the salary treatment afforded respondents. Concluding the salaries of all should have been determined by applying the "highest previous rate" rule, the Navy denied Libretto's claim and notified the other respondents their salaries would be reduced accordingly.

Respondents unsuccessfully pursued their administrative remedies and then filed this action in the Court of Claims under the Tucker Act, 28 U. S. C. § 1491, and the Back Pay Act of 1966, 5 U. S. C. § 5596. Respondents contended they were entitled to a two-step increase in pay pursuant to 5 U. S. C. § 5334(b) (1976 ed., Supp. V). The Government opposed the claims on the ground that § 5334(b) applies only to promotions within the GS and not to shifts or promotions between the WS and the GS, which are governed by § 5334(a).

The Court of Claims, reasoning that respondents had been "promoted" within the meaning of 5 CFR § 531.202(h)(2)

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salary level of the new GS grade. The parties disagree as to the method used to determine the postpromotion salaries of the remaining respondents. Respondents allege they were simply given a two-step increase, pursuant to § 5334(b). The Government explains their GS salaries were originally determined by first applying the provision of subchapter S8–3d of the FPM, Supp. 532–1, Inst. 8 (Jan. 16, 1973), which stated that an employee promoted to a WS position is entitled to be paid at the lowest scheduled rate that exceeds his existing rate of pay by no less than a one-step increment of the category from which he was promoted. Once this adjustment had been made, the new GS salaries of these respondents were computed by applying the "highest previous rate" rule of 5 CFR § 531.203(c) (1969) to the adjusted rates of pay. Thus, each of these respondents was awarded two salary increases for a single change of position. If this method was utilized, the salary determinations were obviously erroneous because subchapter S8–3d and the "highest previous rate" rule of 5 CFR § 531.203(c) (1969) are not applicable to the same personnel action. Regardless of the method used, the effect was to give all respondents except Libretto the equivalent of a two-step increase.

(1969),[6] determined they were entitled to a two-step increase under § 5334(b). Accordingly, the court invalidated, as inconsistent with the statute, 5 CFR § 531.204(a) (1969), which construed § 5334(b) as limited to transfers or promotions within the GS. 220 Ct. Cl. 278, 599 F. 2d 411 (1979).

After remand, the parties stipulated to the amount of respondents' recovery, and the court entered final judgment on August 8, 1980. We granted the Government's petition for writ of certiorari to the United States Court of Claims. 450 U. S. 993 (1981). We have jurisdiction based upon 28 U. S. C. § 1255.

II

We look first to the language and organization of the statutes governing General Schedule pay rates and the prevailing rate wage system. If the statutory language is clear, it is ordinarily conclusive. See *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102 (1980).

Section 5334 is part of subchapter III, chapter 53 of Title 5, entitled "General Schedule Pay Rates." Subsection 5334(a) describes the general conditions, including promotions, under which a GS employee is entitled to a change in basic pay. It directs simply that the rate is "governed by regulations prescribed by the [Civil Service Commission]. . . ." Following that direction, the Civil Service Commission promulgated the "highest previous rate" rule.[7]

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[6] At the time of respondents' promotions, 33 Fed. Reg. 12449 (1968), 5 CFR § 531.202(h) (1969), provided:

"'Promotion' means a change of an employee, while continuously employed, from:

(1) One General Schedule grade to a higher General Schedule grade; or
(2) A lower rate paid under authority other than subchapter III of chapter 53 of title 5, United States Code, to a higher rate within a General Schedule grade."

[7] See 5 CFR § 531.203(c) (1969). The Civil Service Commission promulgated the initial regulation. In 1978, Congress substituted the Office of Personnel Management for the Civil Service Commission. 5 U. S. C. § 1101 *et seq.* (1976 ed., Supp. V). The terms of the regulation have remained consistent since 1950. See n. 15, *infra*.

In subsection 5334(b), on the other hand, Congress restricted the Commission's discretion in one limited situation:

> "An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred."

For purposes of subchapter III, 5 U. S. C. § 5331 assigns the word "grade" the meaning given the term by 5 U. S. C. § 5102(a)(5). That section, in turn, defines a grade as those positions sufficiently similar to warrant their inclusion within one range of rates of basic pay "in the General Schedule." Giving § 5334(b) its plain meaning, then, when an employee is promoted to a position in a higher grade "in the General Schedule," he is entitled to pay which exceeds by two step-increases his pay in the grade "in the General Schedule" from which he was promoted.

The Wage System, on the other hand, is governed by subchapter IV of chapter 53, Title 5. No express statutory provision in subchapter IV defines how an employee's salary should be set when a WS employee is promoted to a GS position. Thus, the only applicable statutory provisions are those found in subchapter III and its accompanying regulations, which specifically limit the two-step increase to promotions within the GS. Nothing in the statutory language indicates Congress intended to include employees promoted from WS to GS within the two-step requirement of § 5334(b). Absent such language, the statute and the accompanying regulations reveal a congressional intent to apply the two-step increase provision of § 5334(b) only to promotions or transfers of employees already within the GS system.

III

Although the language of the statute is clear, any lingering doubt as to its proper construction may be resolved by examining the legislative history of the statute and by according

due deference to the longstanding interpretation given the statute by the agencies charged with its interpretation. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267 (1974). The legislative history of § 5334(b) reinforces the apparent intent of the statutory language. The predecessor to § 5334(b) was § 802(b) of the Classification Act of 1949, 63 Stat. 954, 5 U. S. C. § 1071 *et seq.* (1946 ed. and Supp. IV) (1949 Act).[8] Through the 1949 Act, Congress completely revised the Classification Act of 1923, Pub. L. 516, 42 Stat. 1488, 5 U. S. C. § 661 *et seq.* (1925–1926 ed.). Under the latter statute, an employee who was at the top step of his grade could receive little or no salary increase upon promotion to a higher grade. That inequity resulted because the salary for the higher steps in one grade could equal or exceed the salary for the lower steps in the next higher grade. Congress' 1949 revision plainly undertook to correct this problem: the 1949 Act numbered among its stated purposes the need "to permit the solution of certain troublesome problems or to avoid unintentional pay inequities in the conduct of various personnel transactions." S. Rep. No. 847, 81st Cong., 1st Sess., 4 (1949). Congress, moreover, understood the precise nature of the salary overlap problem. The Committee Reports which accompanied the proposed revisions explained:

> "At present, a promoted employee receives no immediate increase if he is already receiving a rate in the lower grade that also occurs in the higher grade. If he is receiving a rate in the lower grade that falls between two rates of the higher grade, he is promoted at the higher of these two rates.
>
> "In too many cases, accordingly, an employee who is promoted to greater responsibilities or more difficult duties receives no immediate increase in pay. This is not in accord with the commonly accepted principle that a promotion in pay should [concurrently] accompany a promotion in duties and responsibilities.

[8] In 1962, the Act was amended to provide a two-step rather than a one-step salary increase. 5 U. S. C. § 1132(b) (1958 ed., Supp. V).

"Subsection (b) of section 802 corrects this situation." *Id.*, at 38; H. R. Rep. No. 1264, 81st Cong., 1st Sess., 12–13 (1949).

Examination of the history of the prevailing wage system dispels any notion that Congress intended the corrective measure of § 802(b) to apply to movement between the prevailing wage and Classification Act systems. In 1949, each federal agency had its own pay system for blue-collar workers. As a result, employees holding the same federal position in the same locale often received different wages if they worked for different agencies. In addition, each agency had its own job grading system for prevailing wage employees, which resulted in widely varying numbers of grades and wage steps.[9] Nothing in the legislative history suggests that Congress was even aware of—much less was attempting to adjust—the varied results that might occur if a prevailing wage worker moved into a Classification Act position. The 1949 legislative history suggests only that Congress was concerned with inequities that might occur through application of the Classification Act system to movement within that system.

Moreover, in 1972, approximately one year before respondents' promotions, Congress undertook a comprehensive examination of the prevailing wage statutes and amended existing laws to declare congressional policy for the payment of prevailing wage employees. See S. Rep. No. 92–791, p. 1 (1972). Congress' stated purpose was to codify existing law. *Ibid.* As part of the 1972 amendments, Congress for the first time directed that a grading system be established and maintained for prevailing wage employees.[10] 5 U. S. C.

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[9] See Staff Report, President's Panel on Federal Compensation 107 (Jan. 1976).

[10] In 1965, President Johnson directed all executive agencies to coordinate their wage policies and practices under the leadership of the Chairman of the Civil Service Commission. See FPM, Supp. 532–1, App. A–1, B–B–1 (Nov. 16, 1965). As a result, the Coordinated Federal Wage System was developed. In 1972, Congress amended the prevailing wage

§ 5346 (1976 ed. and Supp. V). Even then, Congress made no effort to correlate the WS grades with those used in the GS. By that time, the agency practice of specifically limiting § 5334(b) and its predecessor to transfers between Classification Act, or GS, positions had been followed for nearly 25 years.[11] Congress' failure to correct that practice, if it did not correspond with congressional intent, at the very time Congress was revamping the laws applicable to pay for prevailing wage positions provides further evidence of its intent that § 802(b) and, later, § 5334(b) apply only to GS employees. See *United States* v. *Bergh*, 352 U. S. 40 (1956).

The absence of any indication that Congress intended § 5334(b) to apply to promotions into the GS from the WS is hardly surprising, since the two systems have no necessary or obvious relationship. First, because the WS involves an entirely separate pay structure based on prevailing rates in local wage areas, no necessary overlap occurs between WS and GS salaries. In fact, since WS rates vary by locale, an employee changing from a WS position to a GS position could receive a greater salary, a lesser salary, or the same salary as another employee making the identical change in another part of the country. Moreover, although by definition a change to a higher grade within the GS system involves a change to a position with greater responsibility (see 5 U. S. C. § 5102(a)(5) (1976 ed., Supp. V)), no similar relationship necessarily exists between a WS grade and a GS grade.[12]

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statutes. The purpose of the 1972 amendments was to codify existing law and enact a system for all agencies to use for determining the prevailing wage rates. S. Rep. No. 92–791, p. 1 (1972). As part of the 1972 amendments, Congress added 5 U. S. C. § 5346, which directed the Civil Service Commission to establish and maintain a job grading system for positions covered by subchapter IV. That was the first time Congress directed the maintenance of a uniform system for WS employees.

[11] See Part IV, *infra*.

[12] The two systems are simply independent. Unlike the 10 steps or rates of pay in most GS grades (see 5 U. S. C. § 5332 (1976 ed. and Supp. V)), the WS currently uses only 5 rates for each position (see 5 U. S. C.

Although the legislative history does not expressly indicate that Congress intended to limit § 5334(b) and its predecessor to GS employees, the history provides ample indication that such was Congress' intent. Moreover, the reasons for enactment of the provision are consistent with such a limitation.

IV

Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed consistently over a long period of time. See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1 (1977). In this instance, the agency responsible for proposing and administering § 5334(b) has consistently construed it to apply only to promotions within the GS.

Section 802(b) of the 1949 Act was drafted and submitted to the Congress by the Civil Service Commission.[13] Soon after its enactment, the Civil Service Commission promulgated regulations interpreting the section. The first regulations guaranteed a pay increase to one promoted "to a higher grade between Classification Act [GS] positions . . . ." 15 Fed. Reg. 7868 (1950), 5 CFR § 25.104(a) (Supp. 1951).[14] In contrast, an employee promoted or transferred from another

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§ 5343(c)(2) (1976 ed. and Supp. V)) and before 1972 used only 3 rates. See H. R. Rep. No. 92–339, p. 6 (1971); S. Rep. No. 92–791, p. 2 (1972). In addition, the range of pay in a GS grade is approximately 30 percent of the base rate, but the range in the WS is only approximately 16 percent. See 5 U. S. C. §§ 5332 (chart), 5343(e)(1)(A)–(E) (1976 ed. and Supp. V). Moreover, the periodic step increases in the WS occur considerably more quickly than in the GS. Compare 5 U. S. C. §§ 5335(a)(1)–(3) with 5 U. S. C. §§ 5343(e)(2)(A)–(C) (1976 ed. and Supp. V). As a result, the maximum rate of pay for a position is more often reached, and in a far shorter time, by a WS employee than by a GS employee.

[13] See S. Rep. No. 847, 81st Cong., 1st Sess., 1 (1949).

[14] Congress specifically excluded prevailing rate positions from the Classification Act of 1949. 5 U. S. C. § 1082(7) (1946 ed., Supp. IV). Those positions remain specifically excluded from the General Schedule. 5 U. S. C. §§ 5102(c)(7), 5331 (1976 ed. and Supp. V).

pay system into the Classification Act system was subject to the "highest previous rate" rule. 15 Fed. Reg. 1235 (1950), 5 CFR § 25.103(b) (Supp. 1951). Subsequent versions of the regulations continued to apply the automatic salary increase of § 802(b) and, later, of § 5334(b), only to promotions or transfers within the Classification Act, or GS, system.[15] In fact, the regulation in effect when respondents were promoted expressly provided that the two-step pay increase provision of § 5334(b) applied "only (i) to a transfer from one General Schedule position to a higher General Schedule position, and (ii) to a promotion from one General Schedule grade to a higher General Schedule grade." 33 Fed. Reg. 12450 (1968), 5 CFR § 531.204(a)(1) (1969).[16]

V

The language of the statute, the entire statutory scheme, the legislative history, and consistent administrative inter-

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[15] See, *e. g.*, 15 Fed. Reg. 7868 (1950), 5 CFR § 25.104(a) (Supp. 1951) (refers to "[a]n employee promoted, repromoted or transferred to a higher grade between Classification Act positions or grades"); 25 Fed. Reg. 7147 (1960), 5 CFR § 25.104(a) (1961) ("[t]he requirements of section 802(b) of the [Classification] Act apply in repromotion actions and in transfers involving promotions between Classification Act grades"); 28 Fed. Reg. 10948 (1963), 5 CFR § 531.204(a)(1) (1964) ("[t]he requirements of section 802(b) of the [A]ct, apply in a transfer involving a promotion between Classification Act grades"); 33 Fed. Reg. 12450 (1968), 5 CFR § 531.204(a) (1969) ("[t]he requirements of section 5334(b) of title 5, United States Code, apply only (i) to a transfer from one General Schedule position to a higher General Schedule position, and (ii) to a promotion from one General Schedule grade to a higher General Schedule grade").

[16] The General Accounting Office, authorized to settle and adjust "[a]ll claims and demands whatever . . . against [the Government]," 31 U. S. C. §§ 71, 72, has consistently determined that the "highest previous rate" rule, rather than the automatic step-increase provision, governs transfers or promotions from a WS position to a GS position. See, *e. g.*, *In re Nail*, 59 Comp. Gen. 209 (1980); Letter Decision, 52 Comp. Gen. 695 (1973); Letter Decision, 52 Comp. Gen. 671 (1973); Letter Decision, 44 Comp. Gen. 518 (1965).

pretation all demonstrate the soundness of the Government's position that § 5334(b) is inapplicable to promotions from the Wage System to the General Schedule.

The judgment of the Court of Claims is reversed.

It is so ordered.

Reporter's Note

The next page is purposely numbered 801. The numbers between 567 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM OCTOBER 5, 1981, THROUGH JANUARY 12, 1982

OCTOBER 5, 1981

Affirmed on Appeal

No. 80–1841. AGSALUD, DIRECTOR OF LABOR AND INDUSTRIAL RELATIONS OF HAWAII, ET AL. *v.* STANDARD OIL COMPANY OF CALIFORNIA. Affirmed on appeal from C. A. 9th Cir. Reported below: 633 F. 2d 760.

Appeals Dismissed

No. 80–1795. IN RE 18.86 ACRES OF REAL PROPERTY. Appeal from Super. Ct. N. J., App. Div., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

No. 80–1867. WILLIAMS *v.* OHIO. Appeal from Ct. App. Ohio, Paulding County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

No. 80–2181. VICKROY *v.* UNITED STATES DEPARTMENT OF THE NAVY, LONG BEACH NAVAL SHIPYARD. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 639 F. 2d 791.

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No. 80–6668. PRENZLER *v.* KLEINMAN ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

No. 80–6696. LINDEN *v.* FOX ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

No. 80–6834. PRENZLER *v.* PIKE ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

No. 81–13. MENEGUS *v.* E. I. DU PONT DE NEMOURS & CO. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

No. 81–29. KIRSNER *v.* MARYLAND; and EARL REALTY, INC. *v.* MARYLAND. Appeals from Crim. Ct. Baltimore City, Md., dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these cases.

No. 81–5143. LINDEN *v.* DIAL PRESS ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

No. 81–158. PAPADOPOULOS *v.* OREGON STATE BOARD OF HIGHER EDUCATION. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 48 Ore. App. 739, 617 P. 2d 931.

No. 80–1837. FAITH BAPTIST CHURCH OF LOUISVILLE, NEBRASKA, ET AL. *v.* NEBRASKA EX REL. DOUGLAS, ATTORNEY GENERAL OF NEBRASKA, ET AL. Appeal from Sup. Ct. Neb. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 207 Neb. 802, 301 N. W. 2d 571.

No. 80–1955. CARTER COUNTY FISCAL COURT ET AL. *v.* CARTER COUNTY PUBLIC LIBRARY DISTRICT ET AL. Appeal from Sup. Ct. Ky. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 614 S. W. 2d 536.

No. 80–1956. WHIDDEN *v.* NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 51 N. Y. 2d 457, 415 N. E. 2d 927.

No. 80–2045. BILLMAN *v.* COLUMBUS BAR ASSN. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

No. 80–2047. KULICK ET AL. *v.* DEPARTMENT OF REVENUE OF OREGON. Appeal from Sup. Ct. Ore. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 290 Ore. 507, 624 P. 2d 93.

No. 80–2051. FIDELITY UNION TRUST CO., TRUSTEE, ET AL. *v.* NEW JERSEY HIGHWAY AUTHORITY ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 85 N. J. 277, 426 A. 2d 488.

No. 80–2131. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

No. 80–2139. WISE *v.* GEORGIA STATE BOARD FOR THE EXAMINATION, QUALIFICATION AND REGISTRATION OF ARCHITECTS ET AL. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 247 Ga. 206, 274 S. E. 2d 544.

No. 80–2164. SCHLENZ ET AL. *v.* CASTLE ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 84 Ill. 2d 196, 417 N. E. 2d 1336.

No. 80–2202. BALLY MANUFACTURING CORP. *v.* NEW JERSEY CASINO CONTROL COMMISSION. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 85 N. J. 325, 426 A. 2d 1000.

No. 80–2207. SMITH, TRUSTEE *v.* COMMISSIONER OF REVENUE OF MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 383 Mass. 139, 417 N. E. 2d 967.

No. 80–6662. NEWTON ET AL. *v.* ARKANSAS. Appeal from Sup. Ct. Ark. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 271 Ark. 427, 609 S. W. 2d 328.

No. 80–6878. VANDENBERG *v.* OREGON ET AL. Appeal from Ct. App. Ore. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 48 Ore. App. 609, 617 P. 2d 675.

No. 80–6948. REED *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

No. 81–10. STALLARD *v.* STALLARD. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 221 Va. cxlvi.

No. 81–50. CAMARDO ET AL. *v.* CITY OF ROCHESTER, NEW YORK, ET AL. Appeal from App. Div., Sup. Ct. N. Y., 4th Jud. Dept., dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 79 App. Div. 2d 864, 434 N. Y. S. 2d 514.

No. 81–84. BUNDO ET AL. *v.* MICHIGAN LIQUOR CONTROL COMMISSION. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

No. 81–131. QUINN-MOORE ET AL. *v.* LAMBERT, BANK COMMISSIONER OF ARKANSAS, ET AL. Appeal from Sup. Ct. Ark. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 272 Ark. 324, 614 S. W. 2d 230.

No. 81–166. RASKY *v.* DEPARTMENT OF REGISTRATION AND EDUCATION OF ILLINOIS ET AL. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 87 Ill. App. 3d 580, 410 N. E. 2d 69.

No. 81–5101. BARNETT *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 615 S. W. 2d 220.

No. 80–1960. WILLSON *v.* STATE PERSONNEL BOARD, DEPARTMENT OF GENERAL SERVICES OF CALIFORNIA. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of substantial federal question. Reported below: 113 Cal. App. 3d 312, 169 Cal. Rptr. 823.

No. 80–6743. IVORY ET AL. *v.* WAINWRIGHT, CORRECTIONS SECRETARY, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 393 So. 2d 542.

No. 80–1977. MASON *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 52 N. Y. 2d 236, 418 N. E. 2d 1302.

No. 80–1992. BARTH *v.* FINLEY, CLERK, CIRCUIT COURT OF COOK COUNTY. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 84 Ill. 2d 323, 418 N. E. 2d 751.

No. 80–6655. WATERS *v.* HENDERSON ET AL. Appeal from Ct. App. Tenn. Motion of Frank S. Bloch et al. for leave to file a brief as *amici curiae* denied. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 80–1872. ALLEN *v.* ELLISOR, CHAIRMAN, SOUTH CAROLINA ELECTION COMMISSION. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded with directions to consider whether the case has become moot by reason of the enactment of Act R 655, effective March 20, 1981, whereby § 7–5–120(5)(b) of the South Carolina Code of Laws (1976) was amended. See *Crowell* v. *Mader*, 444 U. S. 505 (1980). Reported below: 664 F. 2d 391.

No. 80–2159. LEHMAN *v.* WEISS. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Parratt* v. *Taylor*, 451 U. S. 527 (1981). Reported below: 642 F. 2d 265.

No. 80–2172. SEEKONK WATER DISTRICT *v.* HERITAGE HOMES OF ATTLEBORO, INC. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981). Reported below: 648 F. 2d 761.

No. 81–211. MICHIGAN *v.* HURD. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Court of Appeals to consider whether its judgment is based upon federal or state constitutional grounds, or both. See *California* v. *Krivda*, 409 U. S. 33 (1972). Reported below: 102 Mich. App. 424, 301 N. W. 2d 881.

No. 81–82. IMMIGRATION AND NATURALIZATION SERVICE *v.* MIRANDA. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Schweiker* v. *Hansen*, 450 U. S. 785 (1981). Reported below: 638 F. 2d 83.

Miscellaneous Orders. (For Court's order making allotment of Justices, see *ante*, p. II.)

No. ——. GODICH *v.* UNION RAILROAD CO. Motion of petitioner to direct the Clerk to accept the petition for writ of certiorari for filing denied.

No. ——. NEW JERSEY STATE BOARD OF HIGHER EDUCATION ET AL. *v.* NEW JERSEY PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYTERIAN CHURCH ET AL. Motion of petitioners to direct the Clerk to accept the petition for writ of certiorari for filing denied.

No. A–196. O'BANNON ET AL. *v.* HALDERMAN ET AL. Application for stay of the order of the United States District Court for the Eastern District of Pennsylvania, entered August 25, 1981, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–198. ORR, GOVERNOR OF INDIANA, ET AL. *v.* UNITED STATES ET AL. D. C. S. D. Ind. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–227. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL.; and

No. A–228. PENNHURST PARENTS STAFF ASSN. *v.* HALDERMAN ET AL. Applications for stay of the orders of the United States District Court for the Eastern District of Pennsylvania, entered April 24, 1980, May 28, 1980, July 14, 1980, and March 2, 1981, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. 77, Orig. TENNESSEE *v.* ARKANSAS. Report and Recommendations of the Special Master adopted. The Special Master is invited to prepare and submit a proposed decree. [For earlier order herein, see, *e. g.*, 451 U. S. 968.]

No. 83, Orig. MARYLAND ET AL. *v.* LOUISIANA. Accounting of Louisiana received and ordered filed. JUSTICE POWELL took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, 452 U. S. 935.]

No. 89, Orig. CALIFORNIA EX REL. STATE LANDS COMMISSION *v.* UNITED STATES. Motion for leave to file bill of complaint granted, and defendant shall have 60 days to answer.

No. 78–1789. ARKANSAS LOUISIANA GAS CO. *v.* HALL ET AL., 453 U. S. 571; and

No. 79–1896. ARKANSAS LOUISIANA GAS CO. *v.* HALL ET AL., 453 U. S. 917. Motion of respondents for clarification denied.

No. 79–1738. NIXON *v.* FITZGERALD; and

No. 80–945. HARLOW ET AL. *v.* FITZGERALD. C. A. D. C. Cir. [Certiorari granted, 452 U. S. 959.] Motion of Morton Halperin et al. for leave to intervene and for other relief in No. 79–1738 denied. Motion of Judith Clark et al. for leave to intervene and for other relief denied.

No. 80–1594. UNITED STATES *v.* ERIKA, INC. Ct. Cl. [Certiorari granted, 451 U. S. 982.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 80–1595. UNITED STATES *v.* FRADY. C. A. D. C. Cir. [Certiorari granted, 453 U. S. 911.] Motion for appointment of counsel granted, and it is ordered that Daniel M. Schember, Esquire, of Washington, D. C., be appointed to serve as counsel for respondent in this case. THE CHIEF JUSTICE and JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 80–1909. HEPPENSTALL CO. *v.* MURPHY ET AL. C. A. 3d Cir.;

No. 80–1945. ARMED FORCES COOPERATIVE INSURING ASSN. *v.* DEPARTMENT OF INSURANCE OF WYOMING. Sup. Ct. Wyo.;

No. 80–2036. JOSEPH *v.* CANNON ET AL. C. A. D. C. Cir.;

No. 80–2056. F/V AMERICAN EAGLE *v.* ALASKA. Sup. Ct. Alaska;

No. 80–2092. SCM CORP. *v.* XEROX CORP. C. A. 2d Cir.;

No. 80–2162. RAMAH NAVAJO SCHOOL BOARD, INC., ET AL. *v.* BUREAU OF REVENUE OF NEW MEXICO. Ct. App. N. M.;

No. 80–2211. SMITH BARNEY, HARRIS, UPHAM & CO., INC. *v.* HENRICKSEN. C. A. 7th Cir.; and

No. 81–219. FIRST WEST VIRGINIA BANCORP., INC., ET AL. *v.* SECURITY NATIONAL BANK & TRUST CO. ET AL. Sup. Ct. App. W. Va. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 80–2049. RALSTON, WARDEN *v.* ROBINSON. C. A. 7th Cir. [Certiorari granted, 452 U. S. 960.] Motion of the Solicitor General to permit David A. Strauss, Esquire, to present oral argument *pro hac vice* granted.

No. 81–152. WEIT ET AL. *v.* CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE WHITE and JUSTICE O'CONNOR took no part in the consideration or decision of this order.

No. 80–6905. IN RE PAREZ. Petition for writ of prohibition denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 80–6826. IN RE MCKNIGHT;
No. 81–5001. IN RE ROSS;
No. 81–5023. IN RE BOYD;
No. 81–5151. IN RE GREEN;
No. 81–5217. IN RE SMITH;
No. 81–5290. IN RE GREEN;
No. 81–5322. IN RE PERRY; and
No. 81–5323. IN RE CONRAD. Petitions for writs of habeas corpus denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

No. 80–2107. IN RE GENERAL ATOMIC CO.;
No. 80–6641. IN RE WELCH;
No. 80–6720. IN RE ROSS;
No. 80–6783. IN RE MAGEE;
No. 80–6850. IN RE SIMON;
No. 81–45. IN RE CANNON;
No. 81–5073. IN RE POE;
No. 81–5095. IN RE SIMS;
No. 81–5099. IN RE DOVE;
No. 81–5139. IN RE WIDEMON;
No. 81–5147. IN RE GREEN;
No. 81–5148. IN RE GREEN;
No. 81–5291. IN RE GREEN; and
No. 81–5292. IN RE GREEN. Petitions for writs of mandamus denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

No. 80–6700. IN RE WIGGINS; and
No. 81–5135. IN RE FARACI. Petitions for writs of mandamus and/or prohibition denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

Probable Jurisdiction Noted or Postponed

No. 80–2100. ROGERS ET AL. *v.* LODGE ET AL. Appeal from C. A. 5th Cir. Probable jurisdiction noted. Reported below: 639 F. 2d 1358.

No. 80–1745. F. W. WOOLWORTH CO. *v.* TAXATION AND REVENUE DEPARTMENT OF NEW MEXICO. Appeal from Sup. Ct. N. M. Probable jurisdiction noted and case set for oral argument in tandem with No. 80–2015, *ASARCO Inc.* v. *Idaho State Tax Commission*, immediately *infra*. Reported below: 95 N. M. 519, 624 P. 2d 28.

No. 80–2015. ASARCO INC. (FORMERLY AMERICAN SMELTING & REFINING CO.) *v.* IDAHO STATE TAX COMMISSION. Appeal from Sup. Ct. Idaho. Probable jurisdiction noted and case set for oral argument in tandem with No. 80–1745, *F. W. Woolworth Co.* v. *Taxation and Revenue Department of New Mexico*, immediately *supra*. Reported below: 102 Idaho 38, 624 P. 2d 946.

No. 80–2165. MURPHY, DISTRICT JUDGE, FOURTH JUDICIAL DISTRICT OF NEBRASKA, DOUGLAS COUNTY *v.* HUNT. Appeal from C. A. 8th Cir. Probable jurisdiction noted. JUSTICE BLACKMUN would postpone further consideration of question of jurisdiction to a hearing of the case on the merits. Reported below: 648 F. 2d 1148.

No. 80–1832. IMMIGRATION AND NATURALIZATION SERVICE *v.* CHADHA ET AL. Appeal from C. A. 9th Cir.;

No. 80–2170. UNITED STATES HOUSE OF REPRESENTATIVES *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir.; and

No. 80–2171. UNITED STATES SENATE *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits in No. 80–1832. Certiorari in Nos. 80–2170 and 80–2171 granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 634 F. 2d 408.

Certiorari Granted. (See also Nos. 80–2170 and 80–2171, *supra.*)

No. 80–1437. ARMY AND AIR FORCE EXCHANGE SERVICE *v.* SHEEHAN. C. A. 5th Cir. Certiorari granted. Reported below: 619 F. 2d 1132.

No. 80–1874. PATSY *v.* BOARD OF REGENTS OF THE STATE OF FLORIDA. C. A. 5th Cir. Certiorari granted. Reported below: 634 F. 2d 900.

No. 80–1924. WEINBERGER, SECRETARY OF DEFENSE, ET AL. *v.* ROSSI ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 206 U. S. App. D. C. 148, 642 F. 2d 553.

No. 80–1990. WEINBERGER, SECRETARY OF DEFENSE, ET AL. *v.* ROMERO-BARCELO ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 643 F. 2d 835.

No. 80–2134. FOREMOST INSURANCE CO. ET AL. *v.* RICHARDSON ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 641 F. 2d 314.

No. 80–2147. CONNECTICUT ET AL. *v.* TEAL ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 645 F. 2d 133.

No. 80–2150. FINNEGAN ET AL. *v.* LEU ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 652 F. 2d 58.

No. 80–2177. LEHMAN ON BEHALF OF HER CHILDREN, LEHMAN ET AL. *v.* LYCOMING COUNTY CHILDREN'S SERVICES AGENCY. C. A. 3d Cir. Certiorari granted. Reported below: 648 F. 2d 135.

No. 80–2204. DIEDRICH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari granted. Reported below: 643 F. 2d 499.

No. 81–61. UNITED MINE WORKERS OF AMERICA HEALTH & RETIREMENT FUNDS ET AL. *v.* ROBINSON ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 205 U. S. App. D. C. 330, 640 F. 2d 416.

No. 80–1608. UNITED STATES *v.* JOHNSON. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 626 F. 2d 753.

No. 81–89. ZANT, WARDEN *v.* STEPHENS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 631 F. 2d 397 and 648 F. 2d 446.

No. 80–1663. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. *v.* ALLIED INTERNATIONAL, INC. C. A. 1st Cir. Certiorari granted and case set for oral argument in tandem with No. 80–1045, *Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Assn.* [certiorari granted, 450 U. S. 1029]. Reported below: 640 F. 2d 1368.

No. 80–1798. WOELKE & ROMERO FRAMING, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.;

No. 80–1808. PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 81–91. OREGON-COLUMBIA CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Motion of Air Conditioning & Refrigeration Institute et al. for leave to file a brief as *amici curiae* in Nos. 80–1798 and 80–1808 granted. Motion of Associated General Contractors of America, Inc., for leave to file a brief as *amicus curiae* in No. 80–1808 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 654 F. 2d 1301.

No. 80–1952. BLUM, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* YARETSKY ET AL. C. A. 2d Cir. Motion of respondents Foley et al. for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 629 F. 2d 817.

No. 80–2178. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND, ET AL. *v.* MORENO ET AL. C. A. 4th Cir. Motion of American Council on Education et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 645 F. 2d 217.

No. 80–6680. MCELROY *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question I presented by the petition. Reported below: 644 F. 2d 274.

No. 80–6835. STREET *v.* NATIONAL BROADCASTING CO. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. Reported below: 645 F. 2d 1227.

Certiorari Denied. (See also Nos. 80–1795, 80–1867, 80–2181, 80–6668, 80–6696, 80–6834, 81–13, 81–29, 81–158, 81–5143, and 80–6655, *supra*.)

No. 80–1655. WARING *v.* KALGRAD NAVIGATION CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 777.

No. 80–1759. YELLOW FREIGHT SYSTEM, INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 1248.

No. 80–1763. SALCINES, STATE ATTORNEY FOR HILLSBOROUGH COUNTY, FLORIDA *v.* BRIGGS ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 392 So. 2d 263.

No. 80–1777. DAVID ORGELL, INC. *v.* JOSIAH WEDGWOOD & SONS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 936.

No. 80–1810. VALMAS BROTHERS SHIPPING, S. A., ET AL. *v.* FISHER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 308.

No. 80–1844. LUX *v.* ANGEL. Ct. App. N. M. Certiorari denied. Reported below: 95 N. M. 361, 622 P. 2d 266.

No. 80–1848. LOGAN ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 640 F. 2d 269.

No. 80–1895. EXXON CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied.

No. 80–1919. INTERCONTINENTAL TRANSPORTATION SERVICES, LTD. *v.* MCNEILL. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 246.

No. 80–2022. MERCKLE *v.* HARPER. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 848.

No. 80–2030. REDERIAKTIEBOLAGET GUSTAF ERIKSON ET AL. *v.* MALLARD ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 236.

No. 80–2033. ROMERO-BARCELO ET AL. *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 643 F. 2d 835.

No. 80–2048. MATSON PLASTERING CO., INC. *v.* OPERATIVE PLASTERERS & CEMENT MASONS INTERNATIONAL ASSN., AFL–CIO, PLASTERERS LOCAL UNION NO. 295; and MATSON PLASTERING CO., INC. *v.* LATHERS LOCAL UNION L–109 ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 1307 (first case).

No. 80–2110. PINTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 646 F. 2d 833.

No. 80–2064. REYNOLDS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 643 F. 2d 707.

No. 80–2196. MOWAD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 641 F. 2d 1067.

No. 80–6642. DOE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 642 F. 2d 1206.

No. 80–6677. JONES *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 247 Ga. 268, 275 S. E. 2d 67.

No. 80–6727. TISDALE *v.* UNITED STATES; and
No. 81–5171. TISDALE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 647 F. 2d 91.

No. 80–6755. MOORE *v.* KNIGHT. Sup. Ct. Miss. Certiorari denied. Reported below: 396 So. 2d 31.

No. 80–6767. MALIK, AKA JOHNSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 80–6769. HOOPER *v.* PERINI. C. A. 6th Cir. Certiorari denied. Reported below: 641 F. 2d 445.

No. 80–6880. LAWS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 84 Ill. 2d 493, 419 N. E. 2d 1150.

No. 80–6890. YARETSKY ET AL. *v.* BLUM, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 629 F. 2d 817.

No. 80–6914. BARGER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 270.

No. 80–6947. PIERCE *v.* CARDWELL, PRISON SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 171.

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No. 81–20. GUIDRY *v.* CONTINENTAL OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 640 F. 2d 523.

No. 81–49. EASTERN AIR LINES, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 69.

No. 81–144. NASSAU COUNTY CIVIL SERVICE COMMISSION ET AL. *v.* KNIGHT. C. A. 2d Cir. Certiorari denied. Reported below: 649 F. 2d 157.

No. 81–153. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* DOW CHEMICAL CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1352.

No. 81–234. KAHLON *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 81–5028. WHITBY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 643 F. 2d 154.

No. 81–5081. LEWINGDON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 81–5150. GREEN *v.* WARDEN, FEDERAL CORRECTIONAL INSTITUTION, TALLEDAGA, ALABAMA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–1523.* FAIRDALE FARMS, INC. *v.* YANKEE MILK, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 635 F. 2d 1037.

No. 80–1573. GLUESENKAMP *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 391 So. 2d 192.

No. 80–1591. MANSUKHANI *v.* PAILING ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 300 N. W. 2d 847.

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*JUSTICE O'CONNOR took no part in the consideration or decision of the petitions in Nos. 80–1523 through 81–5302, *infra*, pp. 818–877.

No. 80–1622. GROTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 387.

No. 80–1644. FLORIDA *v.* BROWN. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 392 So. 2d 280.

No. 80–1672. MORROW *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 271 Ark. 806, 610 S. W. 2d 878.

No. 80–1676. ONE 1976 FORD TRUCK VAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 492 Pa. 541, 424 A. 2d 1323.

No. 80–1692. DECCA LTD. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 225 Ct. Cl. 326, 640 F. 2d 1156.

No. 80–1704. ST. LOUIS COMPREHENSIVE NEIGHBORHOOD HEALTH CENTER, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 633 F. 2d 1268.

No. 80–1705. MCBROOM RIG BUILDING SERVICES, INC. *v.* DIAMOND M DRILLING CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 891.

No. 80–1719. MAZZULLO ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 80–1724. PALUMBO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 123.

No. 80–1731. TARPEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 634 F. 2d 619.

No. 80–1744. CRIST *v.* CRIST. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 1226.

No. 80–1758. HARPRING *v.* CONTINENTAL OIL CO. (CONOCO). C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 406.

No. 80–1762. MANALE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 887.

No. 80–1778. TRANSCO SECURITY INC. OF OHIO ET AL. *v.* FREEMAN, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION. C. A. 6th Cir. Certiorari denied. Reported below: 639 F. 2d 318.

No. 80–1792. HODGES *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 859.

No. 80–1794. HARRIS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 226 Ct. Cl. 593, 640 F. 2d 1309.

No. 80–1799. BARTLETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 1184.

No. 80–1800. FIUMARA ET AL. *v.* UNITED STATES;
No. 80–1972. CLEMENTE *v.* UNITED STATES; and
No. 80–2098. COLUCCI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 640 F. 2d 1069.

No. 80–1811. BENSON ET AL. *v.* HIGHTOWER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 869.

No. 80–1817. BRETZ *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 394 So. 2d 245.

No. 80–1822. THORNBERRY *v.* UNITED STATES;
No. 80–2010. NOEL ET AL. *v.* UNITED STATES; and
No. 80–2020. SEITER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 166.

No. 80–1823. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO, ET AL. *v.* DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 111, 659 F. 2d 157.

No. 80–1824. LATROBE STEEL CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 630 F. 2d 171.

No. 80–1827. RUSS ET UX. *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 1352.

No. 80–1828. SKIDMORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 783.

No. 80–1834. DUARTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 636 F. 2d 1227.

No. 80–1835. CROSS ET AL. *v.* DADE COUNTY SCHOOL BOARD, MIAMI, FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 312.

No. 80–1842. BIFIELD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1063.

No. 80–1843. YOUNG ET AL. *v.* BOGRETTE ET AL. Ct. App. Mich. Certiorari denied.

No. 80–1849. ARSENAULT *v.* ALLEGHENY AIRLINES, INC. C. A. 1st Cir. Certiorari denied. Reported below: 636 F. 2d 1199.

No. 80–1850. COLONIAL BANK OF NEW ORLEANS *v.* VICKERS. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 580.

No. 80–1855. DIVERSIFIED RESOURCES CORP. *v.* BUXTON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 634 F. 2d 1313.

No. 80–1858. VILLAGE OF PENN YAN, NEW YORK, ET AL. *v.* NEW YORK STATE ELECTRIC & GAS CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 638 F. 2d 388.

No. 80–1860. BEAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 84 Ill. 2d 64, 417 N. E. 2d 608.

No. 80–1863. PEABODY COAL CO. *v.* WATT, SECRETARY OF THE INTERIOR. C. A. D. C. Cir. Certiorari denied. Reported below: 209 U. S. App. D. C. 259, 653 F. 2d 514.

No. 80–1866. LEMASTER *v.* MCGONIGLE. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 859.

No. 80–1868. BLANCHET *v.* NEW YORK. Rensselaer County Court, N. Y. Certiorari denied.

No. 80–1870. NEW YORK TYPOGRAPHICAL UNION NO. 6 *v.* TRIANGLE PUBLICATIONS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 561.

No. 80–1871. HOLLY *v.* CHASEN, COMMISSIONER OF CUSTOMS, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 205 U. S. App. D. C. 273, 639 F. 2d 795.

No. 80–1877. CASSESSE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 80 App. Div. 2d 860, 436 N. Y. S. 2d 758.

No. 80–1879. FREEMAN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 2d 291, 414 N. E. 2d 1044.

No. 80–1880. ABCO BUS CO., INC. *v.* MACCHIAROLA, CHANCELLOR, BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 52 N. Y. 2d 938, 419 N. E. 2d 870.

No. 80–1883. GARGANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 563.

No. 80–1885. MCDONALD *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–1886. OLLIVIER ET AL. *v.* GLITZ ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 77.

No. 80–1887. THOMPSON *v.* STETSON, SECRETARY OF THE AIR FORCE, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–1889. PIANKA *v.* GEORGIA;
No. 80–1932. DAVIS *v.* GEORGIA; and
No. 80–1954. WILLIAMS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 157 Ga. App. 476, 277 S. E. 2d 923.

No. 80–1890. KNOETZE *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 207.

No. 80–1891. UNITED MINE WORKERS OF AMERICA ET AL. *v.* KERRY COAL CO. C. A. 3d Cir. Certiorari denied. Reported below: 637 F. 2d 957.

No. 80–1896. LAVELLE *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–1897. KADANS *v.* O'BRIEN. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 634.

No. 80–1899. RAILWAY LABOR EXECUTIVES' ASSN. *v.* GIBBONS, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 78.

No. 80–1900. DENARD *v.* MICHIGAN NATIONAL BANK. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1217.

No. 80–1901. ZUCCARO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 645 F. 2d 104.

No. 80–1902. SCHLEIFFER, A MINOR, BY NEXT OF FRIEND, KER *v.* MEYERS, JUDGE. C. A. 7th Cir. Certiorari denied. Reported below: 644 F. 2d 656.

No. 80–1904. LILY DALE ASSEMBLY *v.* JOSEPHSON. Ct. App. N. Y. Certiorari denied. Reported below: 52 N. Y. 2d 943, 419 N. E. 2d 870.

No. 80–1905. ESCARIZ *v.* BARAHAL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 560.

No. 80–1907. O'HAIR ET AL. *v.* COOKE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 1231.

No. 80–1912. TOUBUS *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 114 Cal. App. 3d 378, 170 Cal. Rptr. 697.

No. 80–1913. MONONGAHELA POWER CO. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 640 F. 2d 504.

No. 80–1914. ZELEZNIK, ADMINISTRATOR *v.* MASSACHUSETTS ET AL. Ct. App. Mass. Certiorari denied.

No. 80–1917. PENNSYLVANIA GAS & WATER CO. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION. Sup. Ct. Pa. Certiorari denied. Reported below: 492 Pa. 326, 424 A. 2d 1213.

No. 80–1918. PENNSYLVANIA GAS & WATER CO. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION. Sup. Ct. Pa. Certiorari denied. Reported below: 492 Pa. 326, 424 A. 2d 1213.

No. 80–1920. TAMARGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 346.

No. 80–1922. GRIER *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 1354.

No. 80–1926. BOLEMAN *v.* CONGDON & CARPENTER CO. C. A. 1st Cir. Certiorari denied. Reported below: 638 F. 2d 2.

No. 80–1927. CUNNINGHAM *v.* NATIONAL RAILROAD PASSENGER CORPORATION, DBA AMTRAK. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 77.

No. 80–1929. BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 632 F. 2d 1107.

No. 80–1930. GRANRUD *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 301 N. W. 2d 398.

No. 80–1933. LAPORTE TRANSIT CO., INC. *v.* LOCAL UNION NO. 301, CHAUFFEURS, TEAMSTERS & HELPERS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 638 F. 2d 1095.

No. 80–1935. GILBERT, TRUSTEE IN BANKRUPTCY, ET AL. *v.* FIRST NATIONAL BANK OF JACKSON, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 686.

No. 80–1943. KIRTZ ET AL. *v.* WIGGIN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 637 F. 2d 572.

No. 80–1944. LUDDY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 281 Pa. Super. 541, 422 A. 2d 601.

No. 80–1948. WRIGLEY *v.* WRIGLEY. Ct. App. Wis. Certiorari denied. Reported below: 99 Wis. 2d 802, 300 N. W. 2d 81.

No. 80–1949. B. F. ET AL. *v.* COLORADO IN THE INTEREST OF T. A. F. Ct. App. Colo. Certiorari denied. Reported below: 624 P. 2d 349.

No. 80–1950. MARINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 639 F. 2d 882.

No. 80–1959. NORDEN RESTAURANT CORP. *v.* SONS OF THE REVOLUTION IN THE STATE OF NEW YORK, INC. Ct. App. N. Y. Certiorari denied. Reported below: 51 N. Y. 2d 518, 415 N. E. 2d 956.

No. 80–1951. MOORE *v.* CAREER SERVICE BOARD OF THE CITY AND COUNTY OF DENVER ET AL. Ct. App. Colo. Certiorari denied.

No. 80–1963. BELL *v.* HINKLE. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 607 S. W. 2d 936.

No. 80–1964. HOLIDAY MOBILE HOME RESORTS, INC., ET AL. *v.* WOOD ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 128 Ariz. 274, 625 P. 2d 337.

No. 80–1966. GOLD ET UX. *v.* NATIONAL SAVINGS BANK OF THE CITY OF ALBANY. C. A. 6th Cir. Certiorari denied. Reported below: 641 F. 2d 430.

No. 80–1967. JAGGARS-CHILES-STOVALL, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 639 F. 2d 1344.

No. 80–1971. STARNES *v.* UNITED STATES; and
No. 80–2001. ROLAND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 644 F. 2d 673.

No. 80–1973. HOPSON, JUDGE, ET AL. *v.* COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE. Sup. Ct. Ky. Certiorari denied. Reported below: 613 S. W. 2d 619.

No. 80–1974. WHITTY *v.* ISRAEL, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 78.

No. 80–1976. DREISKE *v.* THERMASOL, LTD. Ct. App. N. Y. Certiorari denied. Reported below: 52 N. Y. 2d 1069, 420 N. E. 2d 401.

No. 80–1978. PENNSYLVANIA DEPARTMENT OF TRANSPORTATION *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 226 Ct. Cl. 444, 643 F. 2d 758.

No. 80–1968. HUDSON *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 456.

No. 80–1979. TAMER *v.* UNITED STATES;
No. 80–1981. ABRAHAM *v.* UNITED STATES;
No. 80–1983. GOLDFARB *v.* UNITED STATES; and
No. 80–2024. ALADDIN HOTEL CORP. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 643 F. 2d 422.

No. 80–1985. KADANS *v.* LIONEL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 634.

No. 80–1986. DISTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 671 F. 2d 954.

No. 80–1987. RED DIAMOND SUPPLY, INC. *v.* ACME WELDING & SUPPLY, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 1001.

No. 80–1988. HART *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 625 P. 2d 21.

No. 80–1989. FULLERTON *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 1 Ark. App. xvi.

No. 80–1993. LA FARGUE *v.* ST. AMANT, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 1233.

No. 80–1995. TEAMSTERS LOCAL UNION NO. 115 *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 205 U. S. App. D. C. 306, 640 F. 2d 392.

No. 80–1996. FREESE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 226 Ct. Cl. 252, 639 F. 2d 754.

No. 80–1998. SHERRARD ET UX. *v.* OWENS, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 542.

No. 80–1999. 162.20 ACRES OF LAND ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 639 F. 2d 299.

No. 80–2000. BULLARD INDEPENDENT SCHOOL DISTRICT ET AL. *v.* BROWN. C. A. 5th Cir. Certiorari denied. Reported below: 640 F. 2d 651.

No. 80–2002. NIXON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 306.

No. 80–2004. 290 MADISON CORP. ET AL. *v.* CAPONE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 57.

No. 80–2006. TURBYFILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 643 F. 2d 396.

No. 80–2007. SURETY MANAGERS, INC. *v.* STANFORD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 709.

No. 80–2008. GOLDSTEIN, COMPTROLLER OF THE TREASURY OF MARYLAND, ET AL. *v.* REGAN, SECRETARY OF THE TREASURY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 649 F. 2d 863.

No. 80–2009. PARKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 645 F. 2d 1323.

No. 80–2011. BUBLICH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 90 Ill. App. 3d 1198, 418 N. E. 2d 522.

No. 80–2012. BOWLING *v.* BOWLING. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. Certiorari denied. Reported below: 598 S. W. 2d 936.

No. 80–2013. HENDERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 645 F. 2d 627.

No. 80–2014. SAMARA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 643 F. 2d 701.

No. 80–2018. THILL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 81 App. Div. 2d 754, 440 N. Y. S. 2d 583.

No. 80–2019. WYLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 639 F. 2d 770.

No. 80–2023. HURST *v.* HUGHES TOOL CO. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 895.

No. 80–2025. BENTIVEGNA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1071.

No. 80–2026. BROWN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–2028. REID *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 469.

No. 80–2029. BRUNWASSER *v.* STRASSBURGER, JUDGE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 440.

No. 80–2031. O'HARE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 641 F. 2d 83.

No. 80–2032. AMERICAN LAW ASSN. *v.* MERKEL, UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–2034. ECKERD DRUGS OF GEORGIA, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 69.

No. 80–2037. COLE, DBA JIM R. COLE & ASSOCIATES ET AL. *v.* CONTINENTAL OIL CO. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 188.

No. 80–2038. CHANNELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 643 F. 2d 1344.

No. 80–2039. OSTRER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 55.

No. 80–2042. BRADT *v.* SMITH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 796.

No. 80–2044. SHELL OIL CO. ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 635 F. 2d 1108.

No. 80–2050. VAN CLEVE ET VIR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 788.

No. 80–2052. LOCAL 9, INTERNATIONAL CHEMICAL WORKERS UNION, AFL–CIO *v.* EISENBERG, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 859.

No. 80–2053. HAMRICK ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 879.

No. 80–2054. BUETTNER-JANUSCH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 759.

No. 80–2055. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 166.

No. 80–2058. BOUTZ *v.* FEDERAL AVIATION ADMINISTRATION. C. A. D. C. Cir. Certiorari denied.

No. 80–2061. ROME *v.* KANSAS EX REL. COMMISSION ON JUDICIAL QUALIFICATIONS. Sup. Ct. Kan. Certiorari denied. Reported below: 229 Kan. 195, 623 P. 2d 1307.

No. 80–2063. SACKMAN-GILLILAND CORP. *v.* CHELSEA TITLE & GUARANTY CO. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 1211.

No. 80–2065. CALABRESE *v.* UNITED STATES;
No. 80–6694. KNOWLES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 645 F. 2d 1379.

No. 80–2067. COLAHAN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 635 F. 2d 564.

No. 80–2069. CAUCCI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 635 F. 2d 441.

No. 80–2071. ROSLINDALE COOPERATIVE BANK ET AL. *v.* GREENWALD ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 638 F. 2d 258.

No. 80–2072. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 137 and 639 F. 2d 1104.

No. 80–2075. COLEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 861.

No. 80–2080. RON TONKIN GRAN TURISMO, INC. *v.* FIAT DISTRIBUTORS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 1376.

No. 80–2081. OSBORNE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 270.

No. 80–2084. LONG ET AL. *v.* CHEMEHUEVI INDIAN RESERVATION ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 115 Cal. App. 3d 853, 171 Cal. Rptr. 733.

No. 80–2087. BOONE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 641 F. 2d 609.

No. 80–2085. GERIATRICS, INC., DBA EVENTIDE OF LAKEWOOD NURSING HOME *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 640 F. 2d 262.

No. 80–2088. WREN ET AL. *v.* JONES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 635 F. 2d 1277.

No. 80–2090. PRICHARD ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 645 F. 2d 854.

No. 80–2093. SEA-LAND SERVICE, INC. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 80–2095. NEW YORK SHIPPING ASSN., INC., ET AL. *v.* PASCARELL, ACTING REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 650 F. 2d 19.

No. 80–2096. DERONDE *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 28 Cal. 3d 875, 625 P. 2d 220.

No. 80–2097. POTTER INSTRUMENT CO., INC. *v.* STORAGE TECHNOLOGY CORP. ET AL.; and

No. 81–52. CONTROL DATA CORP. ET AL. *v.* POTTER INSTRUMENT CO., INC., ET AL. C. A. 4th Cir. Certiorari denied. [See also 453 U. S. 923.] Reported below: 641 F. 2d 190.

No. 80–2101. JOHNSON *v.* J. O. L. Ct. App. D. C. Certiorari denied.

No. 80–2103. WHITWELL *v.* BOARD OF LAW EXAMINERS OF TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 60.

No. 80–2104. WARD, CORRECTIONAL COMMISSIONER, ET AL. *v.* POWELL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 643 F. 2d 924.

No. 80–2105. CONNER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. lxxix.

No. 80–2108. TUCKER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 1292.

No. 80–2109. CLARK ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 226 Ct. Cl. 658, 652 F. 2d 69.

No. 80–2113. J. W. BATESON, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 226 Ct. Cl. 527, 650 F. 2d 291.

No. 80–2115. SILKWOOD, BY SILKWOOD, ADMINISTRATOR, ET AL. *v.* KERR-MCGEE CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 637 F. 2d 743.

No. 80–2118. DRENNAN *v.* SECURITY PACIFIC NATIONAL BANK. Sup. Ct. Cal. Certiorari denied. Reported below: 28 Cal. 3d 764, 621 P. 2d 1318.

No. 80–2119. CRONEN *v.* CITY OF GALENA PARK, TEXAS. Ct. Civ. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 611 S. W. 2d 651.

No. 80–2121. MARTIN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 157 Ga. App. 304, 277 S. E. 2d 300.

No. 80–2123. WHITT *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 493 Pa. 572, 427 A. 2d 623.

No. 80–2124. AMBASSADOR COLLEGE, INC., ET AL. *v.* MCELROY. Ct. App. Wis. Certiorari denied. Reported below: 100 Wis. 2d 742, 301 N. W. 2d 464.

No. 80–2125. ALLEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 675 F. 2d 1373.

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No. 80–2126. HUNT *v.* HUNT, EXECUTOR. C. A. 5th Cir. Certiorari denied. Reported below: 631 F. 2d 1171.

No. 80–2129. HOKE *v.* AKIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 649 F. 2d 863.

No. 80–2130. SHARPE *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 304 N. W. 2d 220.

No. 80–2132. VERNER ET AL. *v.* BUTCHERS' UNION #127. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 174.

No. 80–2133. QUAD C CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 789.

No. 80–2136. WEBER *v.* BLACK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 579.

No. 80–2137. DAVIS & COX ET AL. *v.* SUMMA CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 170.

No. 80–2140. GADEK, T/A POOR BILLY'S *v.* TOWNSHIP OF WOODBRIDGE. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–2141. TENNESSEE ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 59.

No. 80–2142. PAPPALARDO ET AL. *v.* SHORE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 657 F. 2d 264.

No. 80–2144. FRANCOIS *v.* ADMINISTRATOR OF VETERANS AFFAIRS, VETERANS ADMINISTRATION. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 1233.

No. 80–2145. HOLCOMBE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 80–2148. THIRTY-SIX THOUSAND, ONE HUNDRED TWENTY-FIVE DOLLARS IN UNITED STATES CURRENCY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 1211.

No. 80–2149. COASTAL STATES CRUDE GATHERING CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 643 F. 2d 1125.

No. 80–2154. ZENITH RADIO CORP. ET AL. *v.* MCGRATH. C. A. 7th Cir. Certiorari denied. Reported below: 651 F. 2d 458.

No. 80–2155. SCHIFF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 163.

No. 80–2157. ANCHORAGE TIMES PUBLISHING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 1359.

No. 80–2158. SPIEGEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 861.

No. 80–2160. WILLIAMS ET AL. *v.* JOHNSON ET AL. Ct. App. D. C. Certiorari denied. Reported below: 427 A. 2d 436.

No. 80–2161. MR. A'S RESTAURANT *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 171.

No. 80–2163. DEWEES *v.* UNITED STATES;
No. 81–58. BUTLER *v.* UNITED STATES;
No. 81–80. CAMERON *v.* UNITED STATES; and
No. 81–81. PATTERSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 643 F. 2d 38.

No. 80–2166. TABEROFF *v.* FARMERS GROUP, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 649 F. 2d 869.

No. 80–2167. LAMB *v.* CONNECTICUT GENERAL LIFE INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 643 F. 2d 108.

No. 80–2168. MEDICO *v.* TIME, INC. C. A. 3d Cir. Certiorari denied. Reported below: 643 F. 2d 134.

No. 80–2173. LIPMAN *v.* LEECH, ATTORNEY GENERAL OF TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 612 S. W. 2d 454.

No. 80–2174. MASON *v.* ZAHRADNICK, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 649 F. 2d 864.

No. 80–2176. HAGOPIAN *v.* TREFRY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 639 F. 2d 52.

No. 80–2180. MCROBERTS PROTECTIVE AGENCY ET AL. *v.* ARBEENY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 642 F. 2d 672.

No. 80–2183. CLARK *v.* WILSON. Sup. Ct. Ill. Certiorari denied. Reported below: 84 Ill. 2d 186, 417 N. E. 2d 1322.

No. 80–2184. SINDELL, LOWE & GUIDUBALDI ET AL. *v.* ATTORNEY GENERAL OF OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 640 F. 2d 214.

No. 80–2185. PARIS ET AL. *v.* PROFIT SHARING PLAN OF HOWARD B. WOLF, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 357.

No. 80–2186. BOYD *v.* WESTERN ELECTRIC ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 440.

No. 80–2187. MALMSTEDT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 649 F. 2d 864.

No. 80–2188. FRIARTON ESTATES CORP. ET AL. *v.* CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 79 App. Div. 2d 899, 435 N. Y. S. 2d 872.

No. 80–2189. BECTON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 1294.

No. 80–2190. HADDON HOUSE FOOD PRODUCTS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 205 U. S. App. D. C. 306, 640 F. 2d 392.

No. 80–2191. TOWN OF MORRISTOWN *v.* WOODSON, PRESIDENT, CIVIL SERVICE COMMISSION OF NEW JERSEY, ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–2192. WOOD *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 8th Cir. Certiorari denied. Reported below: 637 F. 2d 1188.

No. 80–2197. ALABAMA EX REL. GRADDICK, ATTORNEY GENERAL OF ALABAMA *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 1061.

No. 80–2198. REED *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 678.

No. 80–2199. SNYDER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–2201. TUCKER *v.* HARTFORD ELECTRIC LIGHT CO. Sup. Ct. Conn. Certiorari denied. Reported below: 183 Conn. 85, 438 A. 2d 828.

No. 80–2206. STROM *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 172.

No. 80–2208. CITRON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 270.

No. 80–2210. MCCABE *v.* DEPARTMENT OF REGISTRATION AND EDUCATION OF ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 90 Ill. App. 3d 1123, 413 N. E. 2d 1353.

No. 80–2212. BARBALICH ET AL. *v.* AMERICAN AUTOMOBILE ASSN. C. A. 5th Cir. Certiorari denied. Reported below: 640 F. 2d 384.

No. 80–2214. BLACK ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 5th Cir. Certiorari denied. Reported below: 640 F. 2d 699.

No. 80–2215. MILWAUKEE TYPOGRAPHICAL UNION NO. 23 *v.* NEWSPAPERS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 639 F. 2d 386.

No. 80–2216. JONES *v.* FAWCETT ET AL. Ct. App. Ark. Certiorari denied. Reported below: 1 Ark. App. xvi.

No. 80–2217. SELIGMAN & ASSOCIATES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 639 F. 2d 307.

No. 80–2218. COLE *v.* GRAY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 804.

No. 80–2219. DAIL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 635 F. 2d 315.

No. 80–2220. MARITIME OVERSEAS CORP. *v.* DIXON. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 560.

No. 80–2221. INDUSTRIAL CONSULTANTS, INC. *v.* H. S. EQUITIES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 746.

No. 80–6108. BONE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 82 Ill. 2d 282, 412 N. E. 2d 444.

No. 80–6168. ALTAMIRANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 147.

No. 80–6255. FELICIANO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 87 Ill. App. 3d 1196, 414 N. E. 2d 1388.

No. 80–6364. STEVENS *v.* KIRKPATRICK. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 782.

No. 80–6387. MCMAHAN *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 617 P. 2d 494.

No. 80–6395. PURNELL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 80–6418. GARCIA-PEREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 643 F. 2d 54.

No. 80–6430. WILBORN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 394 So. 2d 1355.

No. 80–6438. STEIN *v.* BLACKBURN, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 395 So. 2d 1357.

No. 80–6447. FRAZIER *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 165.

No. 80–6458. MINK *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 58.

No. 80–6461. RANDALL, AKA HURD *v.* BAILEY ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–6462. RUTKOWSKY *v.* BOARD OF PRISON TERMS OF CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 80–6478. HARRIS *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 779.

No. 80–6479. THOMPSON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 610 S. W. 2d 629.

No. 80–6486. MAPSON *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 80–6516. YELLEN *v.* LONG, EXECUTOR, ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 387 So. 2d 384.

No. 80–6517. FRANK *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 646 F. 2d 873 and 902.

No. 80–6520. SOUZA *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: —— R. I. ——, 425 A. 2d 893.

No. 80–6529. SAPIO *v.* GOLD, DISTRICT ATTORNEY OF KINGS COUNTY. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 79 App. Div. 2d 691, 433 N. Y. S. 2d 879.

No. 80–6533. POWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 80–6544. JOHNSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 389 So. 2d 400.

No. 80–6545. HARVEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 611 S. W. 2d 108.

No. 80–6548. OTHERSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 1276.

No. 80–6568. CHERRY *v.* DIRECTOR, STATE BOARD OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 635 F. 2d 414.

No. 80–6572. HILLIARD *v.* CARLSON ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–6573. CHRISCO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 59.

No. 80–6578. JOHNSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 398 So. 2d 539.

No. 80–6585. TERRELL *v.* UNITED STATES; and
No. 80–6927. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 644 F. 2d 696.

No. 80–6591. SCHLANG *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 613 S. W. 2d 302.

No. 80–6608. WOOD *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 396 So. 2d 1241.

No. 80–6615. SCOTT *v.* FAUVERGUE ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–6616. SEVERDIA *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 80–6624. MUKA *v.* COHN ET AL.; and MUKA *v.* FOLEY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1289.

No. 80–6625. HOOK *v.* COUGHLIN, CORRECTIONAL COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 561.

No. 80–6626. GRANDISON *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 490.

No. 80–6628. HALL *v.* COUGHLIN, CORRECTIONAL COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1059.

No. 80–6635. ESPINOZA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 641 F. 2d 153.

No. 80–6633. CHAVIS *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 638 F. 2d 534.

No. 80–6636. HAMMONS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–6637. THOMPSON *v.* SCHOEN, CORRECTIONS COMMISSIONER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 657 F. 2d 273.

No. 80–6639. YOUNG *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 80–6643. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 173.

No. 80–6644. SHAW *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–6647. MCCOLPIN *v.* LAMUNYON. C. A. 10th Cir. Certiorari denied.

No. 80–6650. PALMER *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 411 N. E. 2d 643.

No. 80–6652. BELCOURT *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: —— R. I. ——, 425 A. 2d 1224.

No. 80–6653. CLARK *v.* ROMERO, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 80–6656. RODRIGUEZ *v.* TROST, DBA TROST MODEL CRAFT HOBBIES. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 75.

No. 80–6658. LEWIS *v.* SAFEWAY STORES, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–6659. KITSOS, DBA RELIABLE TV SERVICE *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 78.

No. 80–6661. DELESPINE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 80–6664. POLK *v.* LEWIS ET AL. C. A. 2d Cir. Certiorari denied.

No. 80–6665. GLENN *v.* DALLMAN, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 635 F. 2d 1183.

No. 80–6666. PETERSON *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 880.

No. 80–6670. WILLIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. clxii.

No. 80–6673. MONGE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 641 F. 2d 76.

No. 80–6674. REAGLE *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 80–6676. HOUSTON *v.* WARDEN, STATEVILLE CORRECTIONAL CENTER, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 635 F. 2d 656.

No. 80–6678. SHAW *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 79 App. Div. 2d 1116, 436 N. Y. S. 2d 907.

No. 80–6681. WOFFORD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–6682. SPANGENBERG *v.* WELLS FARGO BANK, N. A. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 456.

No. 80–6683. HUMPHREY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6684. CAIN *v.* MOORE, WARDEN. Sup. Ct. Conn. Certiorari denied. Reported below: 182 Conn. 470, 438 A. 2d 723.

No. 80–6685. HURT *v.* DISTRICT OF COLUMBIA BOARD OF PAROLE. C. A. D. C. Cir. Certiorari denied.

No. 80–6686. MAGEE *v.* CAMPOY, ASSOCIATE WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–6687. RODRIGUEZ *v.* OLD ROSE DISTRIBUTORS. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 78.

No. 80–6688. VAN HOUTEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 113 Cal. App. 3d 280, 170 Cal. Rptr. 189.

No. 80–6689. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 650 F. 2d 169.

No. 80–6691. GREEN *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 267.

No. 80–6697. YACAVONE *v.* BOLGER, POSTMASTER GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 207 U. S. App. D. C. 103, 645 F. 2d 1028.

No. 80–6698. KENO *v.* DWYER, JUDGE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–6699. NOVEL *v.* CIVIL COURT OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 162.

No. 80–6705. COX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 871.

No. 80–6707. CRENSHAW *v.* LEEKE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 642 F. 2d 447.

No. 80–6709. ENRIQUEZ *v.* UNITED STATES; and
No. 81–165. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 173.

No. 80–6710. FRAZIER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 638 F. 2d 63.

No. 80–6711. POWELL *v.* LEVIT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 239.

No. 80–6712. HOUSBY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 84 Ill. 2d 415, 420 N. E. 2d 151.

No. 80–6713. HOLBROOK *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–6715. KEY *v.* AMERICAN DEVELOPMENT CORP. ET AL. C. A. 4th Cir. Certiorari denied.

No. 80–6716. FARMAKIS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 79 App. Div. 2d 893, 435 N. Y. S. 2d 869.

No. 80–6719. RICKERSON *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 95 N. M. 666, 625 P. 2d 1183.

No. 80–6721. MOORE *v.* MINTZES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 80–6722. MASON *v.* COUNTY OF WORCESTER ET AL. Ct. App. Mass. Certiorari denied. Reported below: 11 Mass. App. 95, 416 N. E. 2d 1013.

No. 80–6723. STOICA *v.* KLEM ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–6724. WASHINGTON *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 90 Ill. App. 3d 631, 413 N. E. 2d 170.

No. 80–6726. VAN DUYSE *v.* ISRAEL, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 654 F. 2d 724.

No. 80–6728. PLOTKIN *v.* SERRITELLA. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 89 Ill. App. 3d 739, 412 N. E. 2d 7.

No. 80–6729. VAN HOORELBEKE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–6730. MISURACA *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 157 Ga. App. 361, 276 S. E. 2d 679.

No. 80–6731. NEEDHAM *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 400 So. 2d 216.

No. 80–6733. OSBOND *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 128 Ariz. 76, 623 P. 2d 1232.

No. 80–6734. KEATING *v.* MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 643 F. 2d 1315.

No. 80–6736. HYDE *v.* LANE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 654 F. 2d 724.

No. 80–6737. ALERS ET UX. *v.* CITY GOVERNMENT OF SAN JUAN. Sup. Ct. P. R. Certiorari denied.

No. 80–6738. FLORA *v.* MARZULLI, JUDGE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–6739. GRISEL *v.* OREGON STATE PENITENTIARY. Sup. Ct. Ore. Certiorari denied. Reported below: 290 Ore. 719, 625 P. 2d 651.

No. 80–6741. ANDRISANI *v.* MAXON INDUSTRIES, INC., ET AL. Sup. Ct. Nev. Certiorari denied.

No. 80–6742. DRAGON *v.* TROMBLEY, SHERIFF. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 79 App. Div. 2d 768, 435 N. Y. S. 2d 60.

No. 80–6746. BLACK *v.* WOODS, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 651 F. 2d 528.

No. 80–6747. HOHENSEE ET AL. *v.* SHAPP ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 493 Pa. 222, 425 A. 2d 744.

No. 80–6750. PARKER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 80–6751. THANH *v.* CITY OF LACEY, WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 80–6753. MESA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 638 F. 2d 507.

No. 80–6754. ROSS *v.* MILONAS, JUDGE. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 78 App. Div. 2d 777, 432 N. Y. S. 2d 974.

No. 80–6756. HICKMAN *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 226 Ct. Cl. 716, 652 F. 2d 69.

No. 80–6760. BURRESON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 643 F. 2d 1344.

No. 80–6761. WOOD *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 91 Ill. App. 3d 414, 414 N. E. 2d 759.

No. 80–6763. CALLAHAN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–6765. BLANKS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 79 App. Div. 2d 1117, 436 N. Y. S. 2d 792.

No. 80–6766. LUCKETT *v.* SOWDERS, REFORMATORY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 451.

No. 80–6768. SHACKLEFORD *v.* UNITED STATES; and
No. 80–6790. WHITEHEAD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 1214.

No. 80–6770. CARR *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 91 Ill. App. 3d 512, 414 N. E. 2d 1108.

No. 80–6771. COATS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–6772. TISON ET AL. *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 128 Ariz. 388, 626 P. 2d 118.

No. 80–6773. HANSEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 90 Ill. App. 3d 407, 413 N. E. 2d 103.

No. 80–6775. HART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 640 F. 2d 383.

No. 80–6776. HENDERSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1072.

No. 80–6777. SHIELDS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 642 F. 2d 230.

No. 80–6778. PAULSEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 645 F. 2d 13.

No. 80–6779. LUNSFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 267.

No. 80–6781. GASKINS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 82 Ill. App. 3d 37, 402 N. E. 2d 258.

No. 80–6782. ADAMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 91 Ill. App. 3d 1059, 415 N. E. 2d 610.

No. 80–6784. METZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 882.

No. 80–6788. WOOD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 616 S. W. 2d 218.

No. 80–6789. KENNEALLY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 383 Mass. 269, 418 N. E. 2d 1224.

No. 80–6791. KILLION *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 2d 35.

No. 80–6792. HOPPE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 645 F. 2d 630.

No. 80–6793. HARRIS *v.* HEGSTROM. Sup. Ct. Ore. Certiorari denied. Reported below: 290 Ore. 853, 642 P. 2d 307.

No. 80–6794. LASUMBA *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 92 Ill. App. 3d 621, 414 N. E. 2d 1318.

No. 80–6795. WARE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 226 Ct. Cl. 579, 652 F. 2d 68.

No. 80–6796. FARRAKHAN *v.* SEARS, ROEBUCK & CO. C. A. 8th Cir. Certiorari denied.

No. 80–6797. COOPER *v.* MITCHELL, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 647 F. 2d 437.

No. 80–6798. HUMPHREY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

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No. 80–6800. LUSTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 270.

No. 80–6801. CRENSHAW *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–6802. HOLUM *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 209 U. S. App. D. C. 204, 652 F. 2d 197.

No. 80–6803. MOTTON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 395 So. 2d 1337.

No. 80–6804. HENDERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 569.

No. 80–6805. MILLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 644 F. 2d 1241.

No. 80–6806. STRIBLING *v.* REED, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 80–6807. GERMANY *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 639 F. 2d 1301.

No. 80–6808. JOHNSON *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 95 Wash. 2d 1015.

No. 80–6809. PILKINGTON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 302 N. C. 505, 276 S. E. 2d 389.

No. 80–6811. MELTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 68.

No. 80–6813. BOTTOM *v.* COUGHLIN, CORRECTIONAL COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied.

No. 80–6814. IN RE ESTATE OF BARNETT. Ct. App. D. C. Certiorari denied.

No. 80–6815. BENNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 270.

No. 80–6816. ARCHER *v.* COMMISSIONER OF CORRECTION OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 44.

No. 80–6817. TAYLOR *v.* HEARNE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 689.

No. 80–6821. MITCHELL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 283 Pa. Super. 455, 424 A. 2d 897.

No. 80–6822. GRIFFIN *v.* UNITED STATES;
No. 80–6823. MCGOWAN *v.* UNITED STATES; and
No. 80–6827. HERBST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 641 F. 2d 1161.

No. 80–6824. SEXTON *v.* MAYNARD, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 80–6828. CROSS *v.* CAREY ET AL. C. A. 7th Cir. Certiorari denied.

No. 80–6829. CRISAFI *v.* THOMPSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 649 F. 2d 862.

No. 80–6830. COLE *v.* VINCENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 659 F. 2d 1080.

No. 80–6831. SCOTT *v.* SMALL BUSINESS ADMINISTRATION. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1070.

No. 80–6832. BURTON *v.* GREER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 643 F. 2d 466.

No. 80–6833. ZAMNIK *v.* HAIG, SECRETARY OF STATE, ET AL. C. A. 2d Cir. Certiorari denied.

No. 80–6836. MARANGELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1063.

No. 80–6837. TRUSSELL *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 80–6838. CUNNINGHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 2d 35.

No. 80–6840. HOLSEY *v.* CIRCUIT COURT FOR HOWARD COUNTY. Ct. App. Md. Certiorari denied.

No. 80–6842. STEWART ET AL. *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–6847. WILKERSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 427 A. 2d 923.

No. 80–6848. CARPENTER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 430 A. 2d 496.

No. 80–6849. KARMANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 868.

No. 80–6851. RUETZ *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 80–6852. BALDWIN *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 289 Md. 635, 426 A. 2d 916.

No. 80–6853. AYERS *v.* COLLINS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 488.

No. 80–6854. CALDWELL *v.* THOMPSON, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 787.

No. 80–6855. GEANEY *v.* UNITED STATES; and
No. 80–6856. CLANCY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1063.

No. 80–6857. HOHENSEE *v.* PENETAR. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 442.

No. 80–6858. HOHENSEE *v.* CONABOY. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 442.

No. 80–6861. SMITH *v.* KEET, JUDGE. Sup. Ct. Mo. Certiorari denied.

No. 80–6862. ROYSE *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 172.

No. 80–6865. STEBBINS *v.* ARMSTRONG ET AL. Ct. App. D. C. Certiorari denied.

No. 80–6866. SNEAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 929.

No. 80–6867. ROOTS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 70.

No. 80–6868. WIDEMON *v.* NINETY-FIFTH CONGRESS ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–6869. OF OAKKNOLL *v.* BRADFORD HOSPITAL. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 858.

No. 80–6870. CARR *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 95 N. M. 755, 626 P. 2d 292.

No. 80–6871. MCCRARY *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1060.

No. 80–6872. ADAMS *v.* STATE BAR OF WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied.

No. 80–6873. FLASHNER *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 383 Mass. 875, 419 N. E. 2d 288.

No. 80–6874. WHITE *v.* SOWDERS, REFORMATORY SUPERINTENDENT, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 1177.

No. 80–6875. VANDERBERG *v.* BIDDLECOME ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 654 F. 2d 726.

No. 80–6876. FRYSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 80–6879. GREEN *v.* MARTINEZ ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–6881. WILLIAMS *v.* BRISCOE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 641 F. 2d 274.

No. 80–6882. MOLINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 649 F. 2d 870.

No. 80–6884. SMITH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 80–6885. SANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 68.

No. 80–6886. LESHER *v.* KAINRAD, JUDGE, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 65 Ohio St. 2d 68, 417 N. E. 2d 1382.

No. 80–6887. GREER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 643 F. 2d 280.

No. 80–6888. RIVERA *v.* COUGHLIN, CORRECTIONAL COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1061.

No. 80–6889. CHEATHAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6891. TULLY *v.* ZAZZALI, ATTORNEY GENERAL OF NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 637 F. 2d 917.

No. 80–6892. ADAMS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 53 N. Y. 2d 1, 422 N. E. 2d 537.

No. 80–6893. STIREWALT *v.* DIRIENZO, U. S. MARSHAL, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1062.

No. 80–6894. WEBSTER *v.* ENGLE, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 80–6895. PAYNE *v.* LYON, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 492.

No. 80–6896. EDWARDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 2d 1.

No. 80–6897. GOODEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 69.

No. 80–6898. GARVIN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 80–6899. VEVERKA *v.* SCURR, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 647 F. 2d 168.

No. 80–6900. TEW *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 925.

No. 80–6901. WOODS *v.* NEAL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 883.

No. 80–6903. CARR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 647 F. 2d 867.

No. 80–6904. SYERS *v.* BRELJE. C. A. 7th Cir. Certiorari denied.

No. 80–6906. MILLER *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 632 F. 2d 788 and 647 F. 2d 80.

No. 80–6907. STONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1072.

No. 80–6908. RENAUD *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 79 App. Div. 2d 796, 435 N. Y. S. 2d 120.

No. 80–6909. GHARTEY *v.* CAPITULO ET AL. C. A. 2d Cir. Certiorari denied.

No. 80–6910. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 80–6911. MARIANO, AKA BEANS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 646 F. 2d 856.

No. 80–6912. STEADHAM *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 80–6913. MELANSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 691 F. 2d 579.

No. 80–6915. FARRAKHAN *v.* MUTUAL OF OMAHA. C. A. 8th Cir. Certiorari denied.

No. 80–6916. DANNELLEY ET AL. *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 397 So. 2d 577.

No. 80–6917. JOHNSON *v.* GULF COAST COMMUNITY SERVICE ASSN. ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–6918. WENDELN *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 5 Kan. App. 2d xvi, 625 P. 2d 1144.

No. 80–6919. SHIRD *v.* TILLY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 492.

No. 80–6920. NIXON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 457.

No. 80–6921. WOOD *v.* DONOVAN, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 861.

No. 80–6922. DECRESCENTE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 53 N. Y. 2d 995, 424 N. E. 2d 551.

No. 80–6923. WILSON *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 644 F. 2d 889.

No. 80–6924. CHRISTIAN *v.* UNITED STATES; and
No. 80–6943. ADAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 174.

No. 80–6926. BARTON ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 224.

No. 80–6929. HOLSEY *v.* INMATE GRIEVANCE COMMISSION. Ct. App. Md. Certiorari denied. Reported below: 289 Md. 736.

No. 80–6930. BROOKS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 47 Md. App. 738.

No. 80–6931. ASHFORD *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–6935. MULLINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 657 F. 2d 272.

No. 80–6936. HUBBARD *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 429 A. 2d 1334.

No. 80–6937. HILLIARD *v.* WILKINSON ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–6938. ATHERTON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. lxii.

No. 80–6939. FRIEDLAND *v.* DISCIPLINARY COMMISSION OF THE INDIANA SUPREME COURT. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 416 N. E. 2d 433.

No. 80–6941. YBARRA *v.* BASTIAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 891.

No. 80–6940. STORAR, BY HUGHES, GUARDIAN AD LITEM *v.* STORAR ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 52 N. Y. 2d 363, 420 N. E. 2d 64.

No. 80–6944. CARROLL *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 657 F. 2d 262.

No. 80–6945. KERNER *v.* HAELSIG, AKA KERNER. Sup. Jud. Ct. Mass. Certiorari denied.

No. 80–6950. REAGAN *v.* ST. MARTIN'S PRESS. C. A. 2d Cir. Certiorari denied.

No. 81–2. MORAN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. cxxi.

No. 81–6. FORD MOTOR CO. *v.* COMMERCIAL UNION INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 210.

No. 81–7. NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, AFL–CIO, ET AL. *v.* WJLA, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 211 U. S. App. D. C. 312, 656 F. 2d 901.

No. 81–8. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 659 F. 2d 1082.

No. 81–12. FISCHER *v.* DAKOPOLOS. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 614 S. W. 2d 22.

No. 81–15. 154 EAST PARK AVENUE CORP. ET AL. *v.* CITY OF LONG BEACH ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 52 N. Y. 2d 991, 420 N. E. 2d 86.

No. 81–21. MICKLE, MAYOR OF COLUMBUS, ET AL. *v.* CROSS COUNTRY CORP., DBA CROSS COUNTRY PLAZA SHOPPING CENTER. Sup. Ct. Ga. Certiorari denied. Reported below: 247 Ga. 559, 277 S. E. 2d 249.

No. 81–18. WOOLRIDGE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 614 S. W. 2d 536.

No. 81–22. NEIDINGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 647 F. 2d 408.

No. 81–25. ONE 1976 ROLLS ROYCE SILVER SHADOW, SERIAL NO. LRE 25888 *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 445.

No. 81–26. MARKOT ET AL. *v.* HAUSNER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1069.

No. 81–27. LUCE *v.* GOVAN. Ct. Civ. App. Tex., 1st Sup. Jud. Dist. Certiorari denied.

No. 81–28. GORDON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 641 F. 2d 1281.

No. 81–30. HUFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 368.

No. 81–34. DORNIER, GMBH, ET AL. *v.* ELLIOTT ET AL. Super. Ct. Alaska, 4th Jud. Dist. Certiorari denied.

No. 81–36. CARBONE ET AL. *v.* MESERVE ET AL., TRUSTEES. C. A. 1st Cir. Certiorari denied. Reported below: 645 F. 2d 96.

No. 81–37. MINARIK *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 493 Pa. 573, 427 A. 2d 623.

No. 81–40. PROCTOR *v.* KRAMER. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 394 So. 2d 121.

No. 81–41. HAGANS *v.* WATT, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 651 F. 2d 622.

No. 81–42. GREGG *v.* RAHM. C. A. 9th Cir. Certiorari denied. Reported below: 641 F. 2d 755.

No. 81–46. RIVES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 67.

No. 81–47. CONTRERAS DE AVILA ET AL. *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 643 F. 2d 471.

No. 81–54. HEATH *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 396 So. 2d 1033.

No. 81–56. BLAKE ET AL. *v.* PETERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 69.

No. 81–57. KATZ *v.* BANK OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 1024.

No. 81–59. BANGERT ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 645 F. 2d 1297.

No. 81–62. HUNT *v.* BITTMAN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 209 U. S. App. D. C. 203, 652 F. 2d 196.

No. 81–63. BOB MAXFIELD, INC., DBA BOB MAXFIELD AMERICAN, ET AL. *v.* AMERICAN MOTORS CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 1033.

No. 81–65. BEELER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 648 F. 2d 1103.

No. 81–66. FOREMOST INSURANCE CO. *v.* PROGRESS MARINE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 816.

No. 81–70. WHIRLPOOL CORP. *v.* SPAGNUOLO. C. A. 4th Cir. Certiorari denied. Reported below: 641 F. 2d 1109.

No. 81–67. ALTMAN ET AL. *v.* HEALTH AND HOSPITALS GOVERNING COMMISSION OF COOK COUNTY. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 91 Ill. App. 3d 498, 414 N. E. 2d 1091.

No. 81–73. VINYL PRODUCTS MANUFACTURING, INC., ET AL. *v.* CALCO-HAWAIIAN IMPORT-EXPORT CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 791.

No. 81–74. COTTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 646 F. 2d 430.

No. 81–75. GONZALES-GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 645 F. 2d 844.

No. 81–76. ARMISTEAD *v.* CALIFORNIA STATE PERSONNEL BOARD ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 81–77. CLEVELAND *v.* CLEVELAND, EXECUTOR. Sup. Ct. Ga. Certiorari denied. Reported below: 247 Ga. 390, 277 S. E. 2d 249.

No. 81–78. FELSEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 648 F. 2d 681.

No. 81–88. LOCAL 394, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 206, 659 F. 2d 252.

No. 81–90. THIBADEAU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1064.

No. 81–94. REY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 641 F. 2d 222.

No. 81–95. ATTICK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 649 F. 2d 61.

No. 81–100. RICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 645 F. 2d 691.

No. 81–101. LEWIS *v.* COOK COUNTY DEPARTMENT OF PUBLIC AID ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 636 F. 2d 1222.

No. 81–102. BAY ET AL. *v.* GOODYEAR TIRE & RUBBER CO. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 1233.

No. 81–103. DOFF *v.* BRUNSWICK CORP. C. A. 9th Cir. Certiorari denied. Reported below: 638 F. 2d 108.

No. 81–104. BLANTON ET UX. *v.* GENERAL ELECTRIC CREDIT CORPORATION OF GEORGIA. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 1213.

No. 81–105. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 1119.

No. 81–107. FIELDS *v.* FIELDS. Sup. Ct. Ga. Certiorari denied. Reported below: 247 Ga. 437, 276 S. E. 2d 614.

No. 81–108. FEDDERS CORP. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1066.

No. 81–111. ARNAO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1063.

No. 81–115. MAKAH INDIAN TRIBE *v.* LOWER ELWHA TRIBE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 1141.

No. 81–116. DAVIS ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 1028.

No. 81–118. KEMLON PRODUCTS & DEVELOPMENT CO. ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 1315 and 646 F. 2d 223.

No. 81–121. REED ET AL. *v.* GRISSOM. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 622.

No. 81–123. WINTERS *v.* BECK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 79 App. Div. 2d 706, 437 N. Y. S. 2d 925.

No. 81–124. HILL *v.* HILL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 394 So. 2d 676.

No. 81–126. MARSHALL FIELD & CO. *v.* PASKULY. C. A. 7th Cir. Certiorari denied. Reported below: 646 F. 2d 1210.

No. 81–127. GETZ *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 640 F. 2d 383.

No. 81–132. UNITED ELECTRIC CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 227 Ct. Cl. 236, 647 F. 2d 1082.

No. 81–133. WISE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 47 Md. App. 656, 425 A. 2d 652.

No. 81–135. ARKANSAS *v.* PRUE ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 272 Ark. 221, 614 S. W. 2d 221.

No. 81–136. MORALES *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 28 Wash. App. 1001.

No. 81–138. CHANDLER UNIFIED SCHOOL DISTRICT ET AL. *v.* COLLINS. C. A. 9th Cir. Certiorari denied. Reported below: 644 F. 2d 759.

No. 81–140. PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF LOS ANGELES ET AL. *v.* BARKER ET AL.; and

No. 81–141. RECTOR, WARDEN, AND VESTRYMEN OF THE CHURCH OF THE HOLY APOSTLES IN GLENDALE, CALIFORNIA, ET AL. *v.* PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 115 Cal. App. 3d 599, 171 Cal. Rptr. 541.

No. 81–145. TODD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 81–146. ZANG ET AL. *v.* UNITED STATES. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 653 F. 2d 493.

No. 81–147. MCCUTCHEON *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 659 F. 2d 1085.

No. 81–148. MARTIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–149. COOPER *v.* WILLE, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 70.

No. 81–154. DONALD B. RICE TIRE CO., INC. *v.* MICHELIN TIRE CORP. C. A. 4th Cir. Certiorari denied. Reported below: 638 F. 2d 15.

No. 81–156. LEITCH ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 63.

No. 81–159. HATHEWAY *v.* MARSH, SECRETARY OF THE ARMY. C. A. 9th Cir. Certiorari denied. Reported below: 641 F. 2d 1376.

No. 81–161. MANGRUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 649 F. 2d 870.

No. 81–162. MCCRARY ET AL. *v.* POYTHRESS, SECRETARY OF STATE OF GEORGIA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 1308.

No. 81–163. LYON ET AL. *v.* CALIFORNIA ET AL.; and
No. 81–182. TAHOE SHOREZONE REPRESENTATION *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: No. 81–163, 29 Cal. 3d 210, 625 P. 2d 239; No. 81–182, 29 Cal. 3d 240, 625 P. 2d 256.

No. 81–168. LIVINGSTON *v.* CONTINENTAL AIRLINES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 649 F. 2d 868.

No. 81–169. REYNOLDS *v.* GEORGIA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 640 F. 2d 702.

No. 81–170. CORA *v.* UNITED STATES; and
No. 81–5128. GRELLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 81–172. PERRY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 47 Md. App. 752.

No. 81–174. PEREZ ET UX., GUARDIANS *v.* BAHAMAS. C. A. D. C. Cir. Certiorari denied. Reported below: 209 U. S. App. D. C. 193, 652 F. 2d 186.

No. 81–175. MEYER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 47 Md. App. 679, 425 A. 2d 664.

No. 81–178. BIRD *v.* ROTHMAN ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 128 Ariz. 599, 627 P. 2d 1097.

No. 81–179. HOFFMAN *v.* WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1059.

No. 81–190. UZZOLINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 651 F. 2d 207.

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No. 81–197. APPALACHIAN POWER CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 488.

No. 81–205. INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS LOCAL UNION NO. 111 ET AL. *v.* DOUGLAS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 646 F. 2d 1211.

No. 81–208. UPTOWN PEOPLE'S COMMUNITY HEALTH SERVICES BOARD OF DIRECTORS *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 647 F. 2d 727.

No. 81–209. CLAYTON MANUFACTURING CORP. *v.* MOORER. Ct. App. Ariz. Certiorari denied. Reported below: 128 Ariz. 565, 627 P. 2d 716.

No. 81–214. WAKEFIELD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 270.

No. 81–216. SELF RETENTION PROGRAMMERS, INC., ET AL. *v.* INTERNATIONAL ACCIDENT FACILITIES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1070.

No. 81–223. GUARINERI ET UX. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1059.

No. 81–224. UNITED AIRCRAFT CORP. *v.* BODINE, DBA BODINE SOUNDRIVE CO. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–233. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 648 F. 2d 565.

No. 81–245. ABLEIDINGER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 645 F. 2d 865.

No. 81–267. SOLMITZ, BY SOLMITZ, GUARDIAN AD LITEM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 1089.

No. 81–324. FAGAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 66.

No. 81–339. VOLKSWAGENWERK, A.G., ET AL. *v.* SEESE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 648 F. 2d 833.

No. 81–343. CIVELLA ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 648 F. 2d 1167.

No. 81–370. LANGDON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 934.

No. 81–391. LAGORGA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 934.

No. 81–394. DIGILIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1071.

No. 81–5003. BROUGHTON *v.* BROUGHTON. Sup. Ct. N. C. Certiorari denied.

No. 81–5004. FORD *v.* ALDISERT ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–5005. DURHAM ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 59.

No. 81–5006. ALONSO *v.* UNITED STATES; and
No. 81–5201. VIERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 2d 509.

No. 81–5007. JOHNSON *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 650 F. 2d 122.

No. 81–5008. BERNHART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 1120.

No. 81–5010. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 649 F. 2d 870.

No. 81–5011. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 646 F. 2d 1298.

No. 81–5012. ALI *v.* NATIONAL BANK OF PAKISTAN. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1057.

No. 81–5015. HAYES *v.* COFFEY. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1059.

No. 81–5016. BRUTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 647 F. 2d 818.

No. 81–5018. NUGENT ET UX. *v.* WISE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1219.

No. 81–5020. KRAWCZYK *v.* STUBBINS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1068.

No. 81–5022. POPE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 78.

No. 81–5024. SPECTOR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 641 F. 2d 376.

No. 81–5025. VICARETTI *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 208 and 645 F. 2d 100.

No. 81–5027. MILLER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 81–5031. GROFF *v.* TOWNSHIP OF ELIZABETH, LANCASTER COUNTY, PENNSYLVANIA. Pa. Commw. Ct. Certiorari denied. Reported below: 54 Pa. Commw. 192, 420 A. 2d 791.

No. 81–5033. McMILLION *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 47 Md. App. 750.

No. 81–5034. MORRELL *v.* LOUISIANA STATE BAR ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 1212.

No. 81–5040. GULLETT, AKA WOODRING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 654 F. 2d 726.

No. 81–5041. GONZALES-PALMA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 645 F. 2d 844.

No. 81–5042. LEON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 66.

No. 81–5045. USHER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 79 App. Div. 2d 171, 436 N. Y. S. 2d 505.

No. 81–5049. LAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 2d 1087.

No. 81–5051. IN RE McGEAN. Ct. App. D. C. Certiorari denied.

No. 81–5053. LEVY *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 81–5054. PHILLIPS *v.* SLAUGHTER, CLERK, FOURTH JUDICIAL CIRCUIT COURT OF FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 648 F. 2d 1352.

No. 81–5055. QUINONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1064.

No. 81–5057. WORRELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 174.

No. 81–5059. STEWART *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 50 Ore. App. 615, 625 P. 2d 1390.

No. 81–5061. PASCU ET AL. *v.* SCHUIERER. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 162.

No. 81–5063. LUSANE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 81–5064. JOHNSON *v.* UNITED STATES SECRET SERVICE. C. A. 2d Cir. Certiorari denied.

No. 81–5065. DYBEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 654 F. 2d 726.

No. 81–5067. CHAKA *v.* FRANZEN ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–5070. RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 67.

No. 81–5072. LANG ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 644 F. 2d 1232.

No. 81–5074. ROTH *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 305 N. W. 2d 501.

No. 81–5077. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 81–5078. BURNSIDE *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 81–5083. WILSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 617 S. W. 2d 714.

No. 81–5084. BEAZLEY *v.* STATE BAR OF GEORGIA ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 247 Ga. 600, 277 S. E. 2d 686.

No. 81–5087. EDWARDS *v.* TURNER. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 878.

No. 81–5085. MILLER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 89 Ill. App. 3d 973, 412 N. E. 2d 175.

No. 81–5088. BRADSHAW *v.* SCRIPPS CLINIC AND RESEARCH FOUNDATION ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81–5091. FURLOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 644 F. 2d 764.

No. 81–5092. THOMAS *v.* BLACKBURN, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 401 So. 2d 354.

No. 81–5093. WOJLOH *v.* GRANT ET AL. Supreme Bench of Baltimore City, Md. Certiorari denied.

No. 81–5096. BEJARANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 457.

No. 81–5098. ADDICKS *v.* CUPP, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 649 F. 2d 866.

No. 81–5100. DANIELS *v.* REED ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–5102. BAILEY *v.* UNITED STATES;
No. 81–5108. WILLIAMS *v.* UNITED STATES; and
No. 81–5115. BLACKWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 967.

No. 81–5103. FERGUSON *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1058.

No. 81–5106. OSPINA-CARDONA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1063.

No. 81–5109. RUCKER *v.* REGAN, SECRETARY OF THE TREASURY. C. A. 8th Cir. Certiorari denied.

No. 81–5110. MORALES *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th & 10th Jud. Dists. Certiorari denied.

No. 81–5116. CHANDLER *v.* COCHRAN ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 247 Ga. 184, 275 S. E. 2d 23.

No. 81–5119. JACKSON ET AL. *v.* ROYAL BUSINESS MACHINES ET AL. C. A. 5th Cir. Certiorari denied.

No. 81–5120. MYERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 1120.

No. 81–5122. TATE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. cxlix.

No. 81–5123. MCFADDEN *v.* BENSON, DBA L. Z. SHELL NO. 2, ET AL. Ct. App Mich. Certiorari denied.

No. 81–5124. DOE *v.* ANKER ET AL. C. A. 2d Cir. Certiorari denied.

No. 81–5126. CRAWFORD *v.* FENTON, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 646 F. 2d 810.

No. 81–5131. JAMBOIS *v.* MORGAN CITY BANK & TRUST CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 245.

No. 81–5133. DUNCAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–5137. MCFADDEN *v.* TRAVELERS INDEMNITY CO. Ct. App. Mich. Certiorari denied.

No. 81–5141. SERPENTFOOT *v.* ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 247 Ga. 559, 277 S. E. 2d 249.

No. 81–5142. LINDNER *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 644 F. 2d 724.

No. 81–5144. DEHART *v.* WASHINGTON POST CO. Ct. App. D. C. Certiorari denied.

No. 81–5146. DOBBINS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 90 Ill. App. 3d 1198, 418 N. E. 2d 523.

No. 81–5149. GREEN *v.* ALLEN, CORRECTIONS DIRECTOR, ET AL. C. A. 1st Cir. Certiorari denied.

No. 81–5153. RALSTON *v.* SMITH, REFORMATORY SUPERINTENDENT, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 269.

No. 81–5154. SCOTT *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 616 S. W. 2d 39.

No. 81–5155. YATES ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 66 Ohio St. 2d 245, 421 N. E. 2d 855.

No. 81–5159. AYLWARD *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 81–5160. FLYE *v.* PARRATT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 650 F. 2d 152.

No. 81–5161. CAULTON *v.* HOSPITAL OF THE GOOD SAMARITAN. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 169.

No. 81–5162. SCOTT *v.* COLLINS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 492.

No. 81–5163. MERCER *v.* WASHINGTON ET AL. Ct. App. D. C. Certiorari denied.

No. 81–5165. AUSTIN *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1057.

No. 81–5167. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5168. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5170. WALKER *v.* GRAHAM, GOVERNOR OF FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 402 So. 2d 614.

No. 81–5172. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 657 F. 2d 272.

No. 81–5173. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5176. QUARTERMAN *v.* QUARTERMAN ET AL. Ct. App. Ga. Certiorari denied.

No. 81–5179. BEACHBOARD *v.* COLUMBIA UNIVERSITY. Ct. App. N. Y. Certiorari denied. Reported below: 53 N. Y. 2d 608, 425 N. E. 2d 899.

No. 81–5180. HUNT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 729.

No. 81–5183. TORRES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1064.

No. 81–5185. D. B. *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 139 Vt. 634, 431 A. 2d 498.

No. 81–5186. SALAMA *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 649 F. 2d 864.

No. 81–5187. ALEXANDER *v.* STATE ATTORNEY FOR BALTIMORE CITY. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 876.

No. 81–5190. WASHINGTON *v.* UNITED STATES; and
No. 81–5200. WATT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 659 F. 2d 1084.

No. 81–5197. LEE *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 491.

No. 81–5202. SMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 643 F. 2d 942.

No. 81–5206. JOHNAKIN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 494 Pa. 79, 428 A. 2d 1339.

No. 81–5207. HOBBS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 618 S. W. 2d 608.

No. 81–5208. ROBINSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 645 F. 2d 616.

No. 81–5209. RUBIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 651 F. 2d 628.

No. 81–5211. JUDD *v.* UNITED STATES MARINE CORPS. C. A. 9th Cir. Certiorari denied.

No. 81–5213. GIFFORD ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 649 F. 2d 869.

No. 81–5214. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 651 F. 2d 1188.

No. 81–5216. COX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–5220. ABDULBARR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 927.

No. 81–5232. TURNER ET AL. *v.* COWAN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 211 U. S. App. D. C. 311, 656 F. 2d 900.

No. 81–5234. STAFFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 929.

No. 81–5235. HOLLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 648 F. 2d 1352.

No. 81–5236. TIDWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 934.

No. 81–5241. PILGRIM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 66.

No. 81–5250. STOCKMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 1119.

No. 81–5253. GAMBLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 928.

No. 81–5256. TROSHINSKY *v.* ROSEN ET AL. Ct. App. D. C. Certiorari denied. Reported below: 428 A. 2d 847.

No. 81–5259. DOE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 732.

No. 81–5261. SCHORN *v.* CARLSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 659 F. 2d 1082.

No. 81–5263. JETER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 934.

No. 81–5267. CARR *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1058.

No. 81–5269. KAVAJA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 654 F. 2d 727.

No. 81–5273. GONZALEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1073.

No. 81–5275. IVY *v.* UNITED STATES; and
No. 81–5282. GARLINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 928.

No. 81–5285. DELGARDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 732.

No. 81–5289. NOE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 860.

No. 81–5293. GREEN *v.* PERRIN, WARDEN, NEW HAMPSHIRE PRISON, ET AL. C. A. 1st Cir. Certiorari denied.

No. 81–5294. GREEN *v.* WARDEN, U. S. PENITENTIARY, LEAVENWORTH, KANSAS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–5297. BOWMAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 81–5299. EDWARDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 775.

No. 81–5301. VALENCIA, AKA CARILLO-VASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 656 F. 2d 412.

No. 81–5302. WHITE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 649 F. 2d 779.

No. 80–1626. MCCARTHY, SUPERINTENDENT, CALIFORNIA MEN'S COLONY EAST *v.* HARPER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 633 F. 2d 222.

No. 80–1751. ZANT, WARDEN *v.* POTTS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 638 F. 2d 727.

No. 80–1984. MICHIGAN *v.* ARTUSO. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 100 Mich. App. 396, 298 N. W. 2d 746.

No. 80–1646. GENERAL MOTORS CORP. *v.* DIRECTOR OF THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH. C. A. 6th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 636 F. 2d 163.

No. 80–2106. GENERAL ATOMIC CO. *v.* UNITED NUCLEAR CORP. (two cases). Ct. App. Cal., 4th App. Dist. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 113 Cal. App. 3d 359, 169 Cal. Rptr. 827 (first case).

No. 80–1713. LIN, ADMINISTRATOR, ET AL. *v.* AMERICAN AIRLINES, INC., ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 644 F. 2d 594.

No. 80–1838. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. *v.* CITY OF EVANSTON. App. Ct. Ill., 1st Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari, vacate the judgment, and remand the case for further consideration in light of *Parratt* v. *Taylor*, 451 U. S. 527 (1981). Reported below: 89 Ill. App. 3d 701, 411 N. E. 2d 1030.

No. 80–1893. DEWEESE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 632 F. 2d 1267.

No. 80–1994. NASH COUNTY BOARD OF EDUCATION *v.* BILTMORE CO. ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 640 F. 2d 484.

No. 80–1908. O'HAIR ET AL. *v.* CLEMENTS ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 638 F. 2d 1231.

No. 80–1957. SCRIMGEOUR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 636 F. 2d 1019.

No. 80–2120. WITT ET AL. *v.* HARBOUR, SHERIFF, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 644 F. 2d 883.

No. 80–1916. RICHARDS ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 388 So. 2d 573.

No. 80–2089. PETTY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 644 F. 2d 32.

No. 80–1937. FEDERAL ENERGY REGULATORY COMMISSION *v.* PUBLIC SERVICE COMMISSION OF NEW YORK ET AL.;
No. 80–1938. NORTH CAROLINA UTILITIES COMMISSION *v.* PUBLIC SERVICE COMMISSION OF NEW YORK ET AL.; and
No. 80–1939. NORTH CAROLINA NATURAL GAS CORP. ET AL. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE BLACKMUN would grant certiorari. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 206 U. S. App. D. C. 367, 642 F. 2d 1335.

No. 80–1980. MITCHELL *v.* SECRETARY OF THE ARMY. C. A. D. C. Cir. Motion of petitioner to defer consideration of petition for certiorari denied. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this petition.

No. 80–2016. FRACKELTON *v.* SWANSON ET AL. Ct. App. Ohio, Cuyahoga County. Motion of respondents Gus Swanson and Virginia Swanson for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this petition.

No. 80–2059. RANDALL *v.* REYNOLDSON ET AL.; and

No. 80–2060. IN RE RANDALL. C. A. 8th Cir. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 640 F. 2d 898.

No. 80–2143. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 206 U. S. App. D. C. 367, 642 F. 2d 1335.

No. 80–2066. UNIVERSITY OF PITTSBURGH *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 3d Cir. Motion of American Council on Education for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 643 F. 2d 983.

No. 80–2073. STEWART *v.* MINNESOTA MINING & MANUFACTURING CO. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 638 F. 2d 1231.

No. 80–2094. WEAVER ET AL. *v.* PAYTON. Sup. Ct. Cal. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE BRENNAN and JUSTICE BLACKMUN would grant certiorari.

No. 80–2114. LOCHIATTO ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the convictions. Reported below: 397 So. 2d 786.

No. 80–2151. NEW JERSEY *v.* RYAN. Sup. Ct. N. J. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 86 N. J. 1, 429 A. 2d 332.

No. 80–2074 (A–139). WORRELL, DBA CHEROKEE HOMES APARTMENTS *v.* UNITED STATES. C. A. 5th Cir. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this application and this petition. Reported below: 641 F. 2d 878.

No. 80–2175. CONTROL DATA CORP. ET AL. *v.* BALDRIGE, SECRETARY OF COMMERCE, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 210 U. S. App. D. C. 170, 655 F. 2d 283.

No. 80–2179 (A–29). CURLEY *v.* CURLEY. Super. Ct. N. J., App. Div. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 80–6810. PRATT *v.* UNITED STATES. C. A. 1st Cir. Motion of petitioner to strike the brief in opposition granted. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this petition. Reported below: 645 F. 2d 89.

No. 80–6928. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 644 F. 2d 101.

No. 81–120. CITIBANK, N. A., ET AL., TRUSTEES *v.* PHOENIX RESOURCES CO. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 651 F. 2d 1349.

No. 81–337. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner to consolidate with No. 80–2116 denied. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this petition. Reported below: 651 F. 2d 775.

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No. 80–6610. JOHNSON *v.* FLORIDA. Sup. Ct. Fla.;
No. 80–6614. GREENAWALT *v.* ARIZONA. Sup. Ct. Ariz.;
No. 80–6671. TYLER *v.* GEORGIA. Sup. Ct. Ga.;
No. 80–6675. MCMANUS *v.* TEXAS. Ct. Crim. App. Tex.;
No. 80–6702. HARRIS *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 80–6749. NELSON *v.* GEORGIA. Sup. Ct. Ga.;
No. 80–6786. STRICKLAND *v.* GEORGIA. Sup. Ct. Ga.;
No. 80–6839. BROWN *v.* GEORGIA. Sup. Ct. Ga.;
No. 80–6844. JUSTUS *v.* GEORGIA. Sup. Ct. Ga.;
No. 80–6864. GROSECLOSE *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 81–5062. RICKMAN *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 80–6877. MESSER *v.* GEORGIA. Sup. Ct. Ga.;
No. 80–6949. DOUGAN *v.* FLORIDA. Sup. Ct. Fla.;
No. 81–5026. DOUTHIT *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County;
No. 81–5046. RUFFIN *v.* FLORIDA. Sup. Ct. Fla.;
No. 81–5048. HARPER *v.* NEBRASKA. Sup. Ct. Neb.;
No. 81–5056. RUST *v.* NEBRASKA. Sup. Ct. Neb.;
No. 81–5157. PEERY *v.* NEBRASKA. Sup. Ct. Neb.; and
No. 81–5158. PALMES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 80–6610, 393 So. 2d 1069; No. 80–6614, 128 Ariz. 150, 624 P. 2d 828; No. 80–6671, 247 Ga. 119, 274 S. E. 2d 549; No. 80–6702, 28 Cal. 3d 935, 623 P. 2d 240; No. 80–6749, 247 Ga. 172, 274 S. E. 2d 317; No. 80–6786, 247 Ga. 219, 275 S. E. 2d 29; No. 80–6839, 247 Ga. 298, 275 S. E. 2d 52; No. 80–6844, 247 Ga. 276, 276 S. E. 2d 242; Nos. 80–6864 and 81–5062, 615 S. W. 2d 142; No. 80–6877, 247 Ga. 316, 276 S. E. 2d 15; No. 80–6949, 398 So. 2d 439; No. 81–5046, 397 So. 2d 277; No. 81–5048, 208 Neb. 568, 304 N. W. 2d 663; No. 81–5056, 208 Neb. 320, 303 N. W. 2d 490; No. 81–5157, 208 Neb. 639, 305 N. W. 2d 354; No. 81–5158, 397 So. 2d 648.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 81–180. REID *v.* GEORGIA. Ct. App. Ga. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 158 Ga. App. 570, 281 S. E. 2d 650.

No. 81–5013. OMERNICK *v.* CAROW ET AL. C. A. 7th Cir. Motion of respondents for damages denied. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this petition. Reported below: 654 F. 2d 724.

No. 81–5014. OMERNICK ET AL. *v.* WISCONSIN ET AL. Sup. Ct. Wis. Motion of respondents for damages denied. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this petition. Reported below: 100 Wis. 2d 234, 301 N. W. 2d 437.

Rehearing Denied

No. D–175. IN RE DISBARMENT OF FELDSHUH, 452 U. S. 957. Petition for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Stewart (retired) to perform judicial duties in the United States Court of Appeals for the Sixth Circuit beginning February 8, 1982, and ending February 12, 1982, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

OCTOBER 13, 1981

Affirmed on Appeal

No. 80–1958. LOUISIANA DAIRY STABILIZATION BOARD *v.* DAIRY FRESH CORP. ET AL. Affirmed on appeal from C. A. 5th Cir. THE CHIEF JUSTICE and JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 631 F. 2d 67.

*Appeals Dismissed**

No. 81–207. NEW RIVER CO. *v.* ROBINSON, CHIEF, WATER RESOURCES DIVISION, DEPARTMENT OF NATURAL RESOURCES OF WEST VIRGINIA. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question.

No. 81–292. RUSSUM *v.* ESTATE OF RUSSUM. Appeal from Sup. Ct. Miss. dismissed for want of substantial federal question. Reported below: 397 So. 2d 73.

No. 81–364. HOLMES *v.* CITY OF LOS ANGELES. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. Reported below: 117 Cal. App. 3d 212, 172 Cal. Rptr. 589.

No. 81–229. FRITO-LAY, INC. *v.* WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION ET AL. Appeal from Sup. Ct. Wis. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 101 Wis. 2d 169, 303 N. W. 2d 668.

No. 81–5257. SCOTT *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 221 Va. cxxxix.

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*[REPORTER'S NOTE: An order dismissing the appeal in No. 81–240, *Morris, Maryland State Administrator of Election Laws, et al.* v. *Mathers et al.*, issued on October 13, 1981, was vacated on October 19, 1981, on which date the judgment was affirmed. See *post*, p. 934.]

Certiorari Granted—Vacated and Remanded

No. 81–247. ALABAMA *v.* RITTER. Sup. Ct. Ala. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Reed* v. *State*, 407 So. 2d 162 (Ala. 1981). Reported below: 403 So. 2d 154.

Miscellaneous Orders

No. — - ——. WEISS ET AL. *v.* MARSHALL FIELD & CO. ET AL. Application to direct the Clerk to file petitioners' application for an extension of time, presented to JUSTICE STEVENS, and by him referred to the Court, denied. JUSTICE STEVENS took no part in the consideration or decision of this application.

No. A–210. MICHIGAN *v.* RUCINSKI. Application for stay of state court proceedings, addressed to JUSTICE REHNQUIST and referred to the Court, denied. JUSTICE REHNQUIST and JUSTICE O'CONNOR would grant this application.

No. A–226. GAAR ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. U. S. Tax Ct. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–250. CLEVELAND ELECTRIC ILLUMINATING CO. *v.* OFFICE OF CONSUMERS' COUNSEL, SENIOR CITIZENS COALITION, ET AL. Application for stay of execution and enforcement of the judgment of the Supreme Court of Ohio, presented to JUSTICE WHITE, and by him referred to the Court, denied.

No. A–266. ZACHARSKI *v.* UNITED STATES. Application for pretrial release, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–237. IN RE DISBARMENT OF CONNAGHAN. Disbarment entered. [For earlier order herein, see 451 U. S. 979.]

No. 90, Orig. CALIFORNIA *v.* TEXAS ET AL. Application for a temporary restraining order; motion for a preliminary injunction; motion to add the State of Georgia as a party defendant; and motion for leave to file a bill of complaint, and the supplements thereto, are all denied without prejudice. [For earlier order herein, see 453 U. S. 945.]

No. 78–1545. ZIPES ET AL. *v.* TRANS WORLD AIRLINES, INC.; and

No. 80–951. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 450 U. S. 979.] Motions for divided argument granted, and each of the three parties is allotted 20 minutes for oral argument. JUSTICE STEVENS took no part in the consideration or decision of these motions.

No. 79–1738. NIXON *v.* FITZGERALD; and

No. 80–945. HARLOW ET AL. *v.* FITZGERALD. C. A. D. C. Cir. [Certiorari granted, 452 U. S. 959.] Motion of petitioners for divided argument and for additional time for oral argument granted, and 10 additional minutes allotted for that purpose. Respondent also allotted an additional 10 minutes for oral argument. Motion of Mountain States Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 80–11. MERRION ET AL., DBA MERRION & BAYLESS, ET AL. *v.* JICARILLA APACHE TRIBE ET AL.; and

No. 80–15. AMOCO PRODUCTION CO. ET AL. *v.* JICARILLA APACHE TRIBE ET AL. C. A. 10th Cir. [Certiorari granted, 449 U. S. 820.] Motion of petitioners and respondents for additional time for oral argument denied.

No. 80–203. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* CURRAN ET AL. C. A. 6th Cir. [Certiorari granted, 451 U. S. 906.] Motion of Samuel Friedman for leave to file a brief as *amicus curiae* granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 80–644. G. D. SEARLE & CO. *v.* COHN ET AL. C. A. 3d Cir. [Certiorari granted, 451 U. S. 905.] Motion of Association of Trial Lawyers of America for leave to file a brief as *amicus curiae* granted. Motion of Association of Trial Lawyers of America for leave to participate in oral argument as *amicus curiae* denied.

No. 80–986. NORTH HAVEN BOARD OF EDUCATION ET AL. *v.* BELL, SECRETARY OF EDUCATION, ET AL. C. A. 2d Cir. [Certiorari granted, 450 U. S. 909.] Motion of Birch Bayh et al. for leave to file a brief as *amici curiae* granted. Motion of the Solicitor General for divided argument granted. Motion of petitioners for divided argument granted.

No. 80–1199. AMERICAN TOBACCO CO. ET AL. *v.* PATTERSON ET AL. C. A. 4th Cir. [Certiorari granted, 452 U. S. 937.] Motion of the Solicitor General for divided argument granted.

No. 80–1208. NEW ENGLAND POWER CO. *v.* NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION ET AL.;

No. 80–1471. MASSACHUSETTS ET AL. *v.* NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL ET AL.; and

No. 80–1610. ROBERTS, ATTORNEY GENERAL OF RHODE ISLAND, ET AL. *v.* NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION ET AL. Sup. Ct. N. H. [Probable jurisdiction noted, 451 U. S. 981.] Motion of New Hampshire Legislative Utility Consumers' Council to withdraw as a party appellee in Nos. 80–1208, 80–1471, and 80–1610 granted. Motion of New Hampshire Public Utilities Commission and the State of New Hampshire to dismiss the New Hampshire Public Utilities Commission as a party appellee in Nos. 80–1208 and 80–1610 granted. Motion of the Commonwealth of Massachusetts for substitution of New Hampshire Public Utilities Commission as a party appellee in No. 80–1471 denied. It is ordered that the State of New Hampshire be added as a party appellee in No. 80–1471.

No. 80–1188. EDGAR *v.* MITE CORP. ET AL. C. A. 7th Cir. [Probable jurisdiction noted, 451 U. S. 968.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument granted, and 15 additional minutes allotted for that purpose. Motion of appellant for divided argument to permit New York to participate in oral argument as *amicus curiae* granted, and 15 additional minutes allotted for that purpose. Motion of North American Securities Administrators Association, Inc., for leave to file a brief as *amicus curiae* granted.

No. 80–1251. UNITED STATES *v.* VOGEL FERTILIZER CO. Ct. Cl. [Certiorari granted, 450 U. S. 994.] Motion of Delta Metalforming Co., Inc., for leave to file a brief as *amicus curiae* denied.

No. 80–1257. DONALD SCHRIVER, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 451 U. S. 976. Motion of Center on National Labor Policy for leave to file a brief as *amicus curiae* in support of petition for rehearing denied.

No. 80–1345. KAISER STEEL CORP. *v.* MULLINS ET AL. C. A. D. C. Cir. [Certiorari granted, 451 U. S. 969.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 80–6045. KREMER *v.* CHEMICAL CONSTRUCTION CORP. C. A. 2d Cir. [Certiorari granted, 452 U. S. 960.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 80–1348. FLORIDA DEPARTMENT OF STATE *v.* TREASURE SALVORS, INC., ET AL. C. A. 5th Cir. [Certiorari granted, 451 U. S. 982.] Motion of Sydney H. McKenzie III, Esquire, to permit Susan E. Gamble to present oral argument *pro hac vice* granted.

No. 80–1350. COMMUNITY COMMUNICATIONS CO., INC. *v.* CITY OF BOULDER, COLORADO, ET AL. C. A. 10th Cir. [Certiorari granted, 450 U. S. 1039.] Motion of Hybud Equipment Corp. et al. for leave to file a brief as *amici curiae* out of time denied. JUSTICE WHITE took no part in the consideration or decision of this motion.

No. 80–1429. YOUNGBERG, SUPERINTENDENT, PENNHURST STATE SCHOOL AND HOSPITAL, ET AL. *v.* ROMEO, AN INCOMPETENT, BY HIS MOTHER AND NEXT FRIEND, ROMEO. C. A. 3d Cir. [Certiorari granted, 451 U. S. 982.] Motion of Mental Health Advocacy Services et al. for leave to file a brief as *amici curiae* granted.

No. 80–1538. PLYLER, SUPERINTENDENT, TYLER INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* DOE, GUARDIAN, ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 451 U. S. 968]; and

No. 80–1934. TEXAS ET AL. *v.* CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 452 U. S. 937.] Motion of appellees for divided argument granted. Motion of appellees for additional time for oral argument denied.

No. 80–1556. CORY, CONTROLLER OF CALIFORNIA, ET AL. *v.* WHITE, ATTORNEY GENERAL OF TEXAS, ET AL. C. A. 5th Cir. [Certiorari granted, 452 U. S. 904.] Motion of respondent William R. Lummis, Administrator, for divided argument granted.

No. 80–1749. FEDERAL ENERGY REGULATORY COMMISSION ET AL. *v.* MISSISSIPPI ET AL. D. C. S. D. Miss. [Probable jurisdiction noted, 452 U. S. 936.] Motion of appellees for divided argument and for additional time for oral argument denied.

No. 81–5218. IN RE HOLMES. Petition for writ of mandamus denied.

No. 80–1925. UNITED TRANSPORTATION UNION *v.* LONG ISLAND RAILROAD CO. ET AL. C. A. 2d Cir. [Certiorari granted, 452 U. S. 960.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted, and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument.

No. 81–363. KARR *v.* KARR. Sup. Ct. Mont. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 81–5501. BREEST ET AL. *v.* PERRIN, WARDEN, NEW HAMPSHIRE STATE PRISON, ET AL. C. A. 1st Cir. Motion of petitioners to expedite consideration of the petition for certiorari denied.

No. 81–5351. IN RE LOCKLIN;
No. 81–5356. IN RE MAGEE;
No. 81–5406. IN RE BARNER; and
No. 81–5521. IN RE NEALE. Petitions for writs of habeas corpus denied.

No. 81–5295. IN RE MAGEE. Petition for writ of mandamus and prohibition denied.

No. 81–5182. IN RE SCOTT. Petition for writ of prohibition and for other relief denied.

Probable Jurisdiction Noted

No. 81–212. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* MCCLURE ET AL. Appeal from D. C. N. D. Cal. Probable jurisdiction noted. Reported below: 503 F. Supp. 409.

No. 81–9. WASHINGTON ET AL. *v.* SEATTLE SCHOOL DISTRICT NO. 1 ET AL. Appeal from C. A. 9th Cir. Probable jurisdiction noted and case set for oral argument in tandem with No. 81–38, *Crawford* v. *Board of Education of the City of Los Angeles*, *infra*. Reported below: 633 F. 2d 1338.

No. 81–213. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* HOGAN ET AL. Appeal from D. C. Mass. Motion of appellees George Hogan et al. for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 501 F. Supp. 1129.

Certiorari Granted

No. 80–1991. OREGON *v.* KENNEDY. Ct. App. Ore. Certiorari granted. Reported below: 49 Ore. App. 415, 619 P. 2d 948.

No. 80–2102. RENDELL-BAKER ET AL. *v.* KOHN ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 641 F. 2d 14.

No. 80–2043. BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26, ET AL. *v.* PICO, BY HIS NEXT FRIEND, PICO, ET AL. C. A. 2d Cir. Motions of National Association of Secondary School Principals and Charles H. Keating, Jr., et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 638 F. 2d 404.

No. 80–2182. INWOOD LABORATORIES, INC., ET AL. *v.* IVES LABORATORIES, INC.; and

No. 81–11. DARBY DRUG CO., INC., ET AL. *v.* IVES LABORATORIES, INC. C. A. 2d Cir. Motions of American Association of Retired Persons et al. and National Association of Pharmaceutical Manufacturers, Inc., for leave to file briefs as *amici curiae* in No. 80–2182 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 638 F. 2d 538.

No. 80–2209. UNITED STATES *v.* ROSS. C. A. D. C. Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. The parties are directed to address the question whether the Court should reconsider *Robbins* v. *California*, 453 U. S. 420 (1981). Reported below: 210 U. S. App. D. C. 342, 655 F. 2d 1159.

No. 81–1. GOLDSBORO CHRISTIAN SCHOOLS, INC. *v.* UNITED STATES; and

No. 81–3. BOB JONES UNIVERSITY *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 81–1, 644 F. 2d 879; No. 81–3, 639 F. 2d 147.

No. 81–38. CRAWFORD ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari granted and case set for oral argument in tandem with No. 81–9, *Washington* v. *Seattle School District No. 1*, *supra*. Reported below: 113 Cal. App. 3d 633, 170 Cal. Rptr. 495.

Certiorari Denied. (See also Nos. 81–229 and 81–5257, *supra*.)

No. 80–1695. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* PELAEZ DEL CASAL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 295.

No. 80–2046. NEW ORLEANS PUBLIC SERVICE, INC. *v.* UNITED STATES; and

No. 80–2057. MISSISSIPPI POWER & LIGHT CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 899.

No. 80–2099. DAVIS *v.* MUELLAR, SHERIFF. C. A. 8th Cir. Certiorari denied. Reported below: 643 F. 2d 521.

No. 80–2122. ILLINOIS CENTRAL GULF RAILROAD CO. *v.* CITY OF CHEROKEE ET AL.; and

No. 81–350. INTERSTATE COMMERCE COMMISSION *v.* CITY OF CHEROKEE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 641 F. 2d 1220.

No. 80–2193. PAGE *v.* BOLGER, POSTMASTER GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 645 F. 2d 227.

No. 80–2213. WEST GULF MARITIME ASSN. *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 209 U. S. App. D. C. 204, 652 F. 2d 197.

No. 80–2222. FEDDERS CORP. ET AL. *v.* CHRYSLER CORP. ET AL.; and

No. 81–218. CHRYSLER CORP. *v.* FEDDERS CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 643 F. 2d 1229.

No. 80–6764. HALL ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 90 Ill. App. 3d 1073, 414 N. E. 2d 201.

No. 80–6859. GALE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 429 A. 2d 177.

No. 81–4. CHIRAVACHARDHIKUL *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 645 F. 2d 248.

No. 81–32. MOSHER STEEL CO. *v.* DONOVAN, SECRETARY OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 768.

No. 81–33. WOLLMAN *v.* GROSS. C. A. 8th Cir. Certiorari denied. Reported below: 637 F. 2d 544 and 646 F. 2d 1306.

No. 81–39. SHAMSEE *v.* UNITED NATIONS JOINT STAFF PENSION FUND ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 53 N. Y. 2d 739, 421 N. E. 2d 848.

No. 81–48. KEELER ET AL. *v.* JOY, COMMISSIONER OF RENT AND HOUSING MAINTENANCE OF NEW YORK CITY. C. A. 2d Cir. Certiorari denied. Reported below: 641 F. 2d 1044.

No. 81–64. TOSE ET AL. *v.* FIRST PENNSYLVANIA BANK, N. A., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 648 F. 2d 879.

No. 81–83. SALONE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 645 F. 2d 875.

No. 81–92. SPENCER ET AL. *v.* RIGBY, THATCHER & ANDRUS, P. A. Sup. Ct. Idaho. Certiorari denied. Reported below: 102 Idaho 69, 625 P. 2d 1072.

No. 81–93. EAIN *v.* WILKES, UNITED STATES MARSHAL. C. A. 7th Cir. Certiorari denied. Reported below: 641 F. 2d 504.

No. 81–98. COOK ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 227 Ct. Cl. 574, 652 F. 2d 70.

No. 81–109. CASTRO ET UX. *v.* SAUDI ARABIA. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 1213.

No. 81–110. TOPPING ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 493.

No. 81–128. LYON & RYAN FORD, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 647 F. 2d 745.

No. 81–139. NARVA HARRIS CONSTRUCTION CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 227 Ct. Cl. 683, 652 F. 2d 71.

No. 81–143. STURM, RUGER & CO., INC. *v.* DAY. Sup. Ct. Alaska. Certiorari denied. Reported below: 615 P. 2d 621 and 627 P. 2d 204.

No. 81–164. CITY OF PAINESVILLE, OHIO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 1186.

No. 81–193. MUND *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 81–195. JONES *v.* JONES. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 81–203. ARIZA-IBARRA ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 651 F. 2d 2.

No. 81–210. OHIO *v.* PETERSON, LOWRY, RALL, BARBER & ROSS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 651 F. 2d 687.

No. 81–220. KINGSBURY *v.* GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 649 F. 2d 740.

No. 81–227. HALPRIN ET AL. *v.* NEW YORK CITY CONCILIATION AND APPEALS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 909.

No. 81–230. ROBINSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. cxxxvi.

No. 81–232. MATHERS ET AL. *v.* MORRIS, MARYLAND STATE ADMINISTRATOR OF ELECTION LAWS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 649 F. 2d 280.

No. 81–243. SILVERTON *v.* REGAN, SECRETARY OF THE TREASURY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 644 F. 2d 1341.

No. 81–246. KANIA *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 227 Ct. Cl. 458, 650 F. 2d 264.

No. 81–248. WAYS & MEANS, INC., ET AL. *v.* IVAC CORP. C. A. 9th Cir. Certiorari denied. Reported below: 638 F. 2d 143.

No. 81–251. CIACCIO *v.* CITY OF DENISON. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 1214.

No. 81–252. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* DUNCAN. C. A. 5th Cir. Certiorari denied. Reported below: 646 F. 2d 1020.

No. 81–258. MILSTEAD *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION 957, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 649 F. 2d 395.

No. 81–259. STATE TAX COMMISSION OF MISSISSIPPI ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 4.

No. 81–262. WILLIAMS, DBA INDUSTRIAL COMMUNICATIONS *v.* PUBLIC SERVICE COMMISSION OF WYOMING ET AL. Sup. Ct. Wyo. Certiorari denied. Reported below: 626 P. 2d 564.

No. 81–263. KUHLMAN *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 81–269. MURPHY *v.* HARLEYSVILLE MUTUAL INSURANCE CO. Super. Ct. Pa. Certiorari denied. Reported below: 282 Pa. Super. 244, 422 A. 2d 1097.

No. 81–270. MANSFIELD *v.* SECURITIES INVESTOR PROTECTION CORP. C. A. 9th Cir. Certiorari denied.

No. 81–275. REFINED METALS CORP. *v.* UNDERHILL. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 270.

No. 81–277. MAZUREK *v.* MILLER ET AL. Ct. App. Wis. Certiorari denied. Reported below: 100 Wis. 2d 426, 303 N. W. 2d 122.

No. 81–278. PACIFIC POWER & LIGHT CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 644 F. 2d 1358.

No. 81–281. LONG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 651 F. 2d 239.

No. 81–282. LAWRENCE *v.* CREDITHRIFT OF AMERICA, INC. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 2d 506.

No. 81–283. BURKEE *v.* BUSCHE. C. A. 7th Cir. Certiorari denied. Reported below: 649 F. 2d 509.

No. 81–284. CAMPBELL *v.* WASHINGTON ET AL. Ct. App. Wash. Certiorari denied. Reported below: 28 Wash. App. 1025.

No. 81–285. WILLIAMSON ET AL. *v.* TUCKER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 404.

No. 81–288. WRIGHT ET AL. *v.* RHOADES, ADMINISTRATRIX. Sup. Ct. Utah. Certiorari denied. Reported below: 622 P. 2d 343.

No. 81–294. NAZARIAN *v.* NAZARIAN. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–295. MEMBERS OF THE BRIDGEPORT HOUSING AUTHORITY POLICE FORCE ET AL. *v.* CITY OF BRIDGEPORT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 55.

No. 81–297. SHREVE EQUIPMENT, INC. *v.* CLAY EQUIPMENT CORP. C. A. 6th Cir. Certiorari denied. Reported below: 650 F. 2d 101.

No. 81–299. FEDERAL ELECTION COMMISSION *v.* MACHINISTS NON-PARTISAN POLITICAL LEAGUE; and FEDERAL ELECTION COMMISSION *v.* CITIZENS FOR DEMOCRATIC ALTERNATIVES IN 1980. C. A. D. C. Cir. Certiorari denied. Reported below: 210 U. S. App. D. C. 267, 655 F. 2d 380 (first case); 210 U. S. App. D. C. 284, 655 F. 2d 397 (second case).

No. 81–303. MCNAMARA *v.* QUIROZ. Sup. Ct. Minn. Certiorari denied.

No. 81–306. JACOBSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 990.

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No. 81–308. HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL PENSION FUND ET AL. *v.* ROSEN. C. A. 3d Cir. Certiorari denied. Reported below: 637 F. 2d 592.

No. 81–316. HERITAGE HOMES OF ATTLEBORO, INC. *v.* SEEKONK WATER DISTRICT. C. A. 1st Cir. Certiorari denied. Reported below: 648 F. 2d 761.

No. 81–357. LACEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 659 F. 2d 1085.

No. 81–379. WYLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 912.

No. 81–5019. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 696.

No. 81–5030. LAMAGNA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 775.

No. 81–5036. ROGERS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 52 N. Y. 2d 527, 421 N. E. 2d 491.

No. 81–5052. BURKHEAD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 646 F. 2d 1283.

No. 81–5058. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 66.

No. 81–5066. KIMMES *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 10th Cir. Certiorari denied. Reported below: 647 F. 2d 1028.

No. 81–5069. IN RE ZATKO. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 912.

No. 81–5094. STOUT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 657 F. 2d 273.

No. 81–5111. SCHMADER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 650 F. 2d 533.

No. 81–5127. FEARANCE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 620 S. W. 2d 577.

No. 81–5184. CASANOVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 300.

No. 81–5191. OATES *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 618 S. W. 2d 608.

No. 81–5193. CALLOWAY *v.* MORRIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 169.

No. 81–5194. FARRAKHAN *v.* XEROX CORP. C. A. 8th Cir. Certiorari denied. Reported below: 650 F. 2d 926.

No. 81–5196. MORROW *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 646 F. 2d 1229.

No. 81–5198. PARKHURST ET AL. *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 628 P. 2d 1369.

No. 81–5199. NEAL *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 92 Ill. App. 3d 1199, 423 N. E. 2d 995.

No. 81–5203. WASHINGTON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 648 F. 2d 276.

No. 81–5210. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5212. CLUMM *v.* JAGO, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Ohio. Certiorari denied.

No. 81–5219. SWAIN *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 648 F. 2d 1352.

No. 81–5223. VAUGHN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 81–5221. OWENS ET UX. *v.* MURPHREE ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 615 S. W. 2d 463.

No. 81–5224. WALKER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 91 Ill. App. 3d 1193, 419 N. E. 2d 1271.

No. 81–5225. LAWSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 90 Ill. App. 3d 1199, 418 N. E. 2d 524.

No. 81–5226. PASCARELLA *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 92 Ill. App. 3d 413, 415 N. E. 2d 1285.

No. 81–5227. LAMORE *v.* INLAND DIVISION OF GENERAL MOTORS CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 659 F. 2d 1081.

No. 81–5229. EPPS *v.* CONTINENTAL CAN CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 920.

No. 81–5230. STUART *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 81–5231. NELSON *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 92 Ill. App. 3d 35, 415 N. E. 2d 688.

No. 81–5233. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5237. LINKLETTER *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 1116.

No. 81–5238. JOHNSON, AKA WESSON *v.* KANSAS. C. A. 10th Cir. Certiorari denied.

No. 81–5239. ZAPATA *v.* ZAPATA. Ct. App. D. C. Certiorari denied.

No. 81–5242. QUATTLEBAUM *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 400 So. 2d 1338.

No. 81–5244. SIMPSON *v.* ENGLE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied.

No. 81–5245. FOSTER *v.* ESTELLE. C. A. 5th Cir. Certiorari denied.

No. 81–5246. LIPSCOMB *v.* AMERICAN EXPRESS CO. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1070.

No. 81–5247. PETERSON *v.* FOGG, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 81–5248. SEYMORE *v.* READER'S DIGEST ASSN., INC. C. A. 2d Cir. Certiorari denied. Reported below: 657 F. 2d 264.

No. 81–5249. HARRIS *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 62.

No. 81–5252. YECHESKEL *v.* HOWARD UNIVERSITY. C. A. D. C. Cir. Certiorari denied. Reported below: 211 U. S. App. D. C. 312, 656 F. 2d 901.

No. 81–5255. SMITH *v.* DEVITT ET AL. C. A. 5th Cir. Certiorari denied.

No. 81–5258. SWINICK *v.* HORN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 2d 915.

No. 81–5260. STEIN *v.* CITY OF UNIVERSITY PARK, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 81–5262. NASH *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 101 Wis. 2d 731, 306 N. W. 2d 306.

No. 81–5264. STAMPS *v.* MISSOURI DEPARTMENT OF CORRECTIONS ET AL. Sup. Ct. Mo. Certiorari denied.

No. 81–5265. HENDERSON *v.* ROCKWELL INTERNATIONAL, INC. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1067.

No. 81–5268. WISCONSIN EX REL. REDDIN *v.* MEEKMA, DODGE COUNTY SHERIFF. Sup. Ct. Wis. Certiorari denied. Reported below: 102 Wis. 2d 358, 306 N. W. 2d 664.

No. 81–5270. SMITH *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–5272. STONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 934.

No. 81–5276. BROOKS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 81–5281. RAGULEN *v.* CITY OF CLEVELAND. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 81–5283. BOZEMAN *v.* MARSHALL. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 932.

No. 81–5286. DICKINSON *v.* UNTREINER, SHERIFF OF ESCAMBIA COUNTY, FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 777.

No. 81–5300. MASON *v.* REDMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1069.

No. 81–5304. MILLS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 641 F. 2d 785.

No. 81–5306. HELZER *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1071.

No. 81–5307. HAYES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81–5308. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5311. GIBBS *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 921.

No. 81–5316. BELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 648 F. 2d 212.

No. 81–5318. PARRISH *v.* CITY OF VIRGINIA BEACH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 492.

No. 81–5327. GREGORY *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 648 F. 2d 1350.

No. 81–5328. JOHL *v.* ACTORS' EQUITY ASSN. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 561.

No. 81–5337. WATSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 397 So. 2d 1337.

No. 81–5345. BOTTOSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 2d 1174.

No. 81–5346. OWENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 702.

No. 81–5348. BREWER *v.* MERIT SYSTEMS PROTECTION BOARD ET AL. C. A. D. C. Cir. Certiorari denied.

No. 81–5352. DUARTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 656 F. 2d 412.

No. 81–5360. UNITED STATES EX REL. DZAMBAZOVIC *v.* LANE. C. A. 7th Cir. Certiorari denied. Reported below: 657 F. 2d 272.

No. 81–5362. CALDWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 651 F. 2d 429.

No. 81–5367. PATTERSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 209 U. S. App. D. C. 249, 652 F. 2d 1046.

No. 81–5371. KRIZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 292.

No. 81–5373. MOLINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 653 F. 2d 403.

No. 81–5385. SELVAGGI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 912.

No. 81–5395. FLORES-ELIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 650 F. 2d 1149.

No. 81–5398. PITTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1074.

No. 80–1831. BOARD OF EDUCATION OF THE NORTH LITTLE ROCK, ARKANSAS SCHOOL DISTRICT, ET AL. *v.* DAVIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 635 F. 2d 730.

JUSTICE REHNQUIST, dissenting.

Both the Court of Appeals and the District Court have treated this as a school desegregation case, as indeed it is for substantive purposes. But in my view both the Court of Appeals and the District Court wholly failed to come to grips with the requirement that there be an Art. III controversy between the parties to the case before a federal court may either entertain it in the first instance or entertain additional proceedings in a case in which the requirements of Art. III at one time were met. It has always been my understanding that Art. III requirements are as important in desegregation

cases as they are in quiet title cases, Fair Labor Standards Act cases, and any number of other types of cases where federal-question jurisdiction may exist. I disagree with the decision of the Court to deny certiorari in this case because, whatever the merits of the dispute as to whether petitioners have or have not achieved a "unitary" school system, litigation to prove or disprove this fact must be conducted by parties who meet the "case or controversy" test.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 32 (1971), the Court stated that "once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated," there is no longer a constitutional violation which would enable the district court to entertain additional litigation in that particular case. Admittedly, school desegregation cases are often long and seemingly intractable; but as the Court said in *Swann*, *supra*:

> "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*." *Id.*, at 31.

There is no doubt that a district court is at liberty to treat as a class action a suit filed for the purposes of attaining a "unitary" school system, but it is conceded that no class was ever certified in this case. As we said in *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 430 (1976):

> "Counsel for the individual named respondents, the original student plaintiffs and their parents, argued that this litigation was filed as a class action, that all the parties have until now treated it as a class action, and that the failure to obtain the class certification required under Rule 23 is merely the absence of a meaningless 'verbal recital' which counsel insists should have no effect on the facts of this case. But these arguments overlook the fact that the named parties whom counsel originally un-

> dertook to represent in this litigation no longer have any stake in its outcome. As to them the case is clearly moot. And while counsel may wish to represent a class of unnamed individuals still attending the Pasadena public schools who do have some substantial interest in the outcome of this litigation, there has been no certification of any such class which is or was represented by a named party to this litigation."

We there concluded that it was only the presence of the United States as a statutorily authorized intervenor on the side of the original plaintiffs that prevented the case from becoming moot.

School desegregation cases are to the latter half of this century what utility-rate cases were to the first half of it, and what equity receivership cases were to the latter half of the 19th century. Each of these groups of cases has the potential for continued litigation which run-of-the-mine federal criminal cases on direct appeal, and other types of federal civil litigation, do not have. Perhaps because of this fact, there is a tendency on the part of both the litigants and the courts to dispense with what may be regarded as "meaningless 'verbal recital[s]'" which do not bear directly on the substantive issues of the case. But it is worth stating again, as it has been repeatedly stated before, that Art. III courts are forums of limited jurisdiction, not courts of general jurisdiction such as exist in most, if not all, of the States.

Yet the Court of Appeals in this case devoted not a single word to the conceded fact that there had been at the time of the most recent hearing in the District Court no remaining plaintiff with a stake in the outcome of the case, nor had there been any previous certification of a class action. Nor, so far as the opinions of the District Court attached to the petition as appendices reveal, did the District Court address the issue. No doubt some, if not all, of the confusion surrounding this case resulted from the appointment of Judge

Henley to the Court of Appeals, the death of Judge Shell, and the reassignment of the entire civil docket in the Eastern District of Arkansas on September 1, 1978, in anticipation of the filling of newly created judgeships. App. to Pet. for Cert. A–27.

But regrettable and unavoidable as this confusion may have been, it does not and cannot explain the failure of any of the District Court opinions or the opinion of the Court of Appeals to even address the existence of a case or controversy. From reading those opinions, one would gather that only such remedial issues as faculty assignment, scope of busing, and the like were at issue here. But I think the existence of a case or controversy sought to be saved by an unexplained granting of a motion for intervention in 1977, and not even mentioned by the Court of Appeals, has considerable significance for the federal judicial system over a wide range of cases. I would therefore grant the petition for certiorari limited to the following question, which I believe is fairly subsumed under Question II in the petition:

> "Is a District Court at liberty to grant a motion for intervention in a case which has become moot, without any principled explanation therefor, or any reasoned justification of its action by the Court of Appeals, in order to continue its supervision of the operation of a school district?"

No. 80–2082. BOLES ET AL. *v.* CHAVIS. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 643 F. 2d 1281.

JUSTICE REHNQUIST, dissenting.

This case originated in the United States District Court for the Northern District of Illinois, and that court issued a brief memorandum opinion and order denying relief to respondent

Chavis. Respondent had brought an action under 42 U. S. C. § 1983 claiming that he had been denied constitutional rights as a result of prison procedures set in motion by the stabbing of a correctional officer at one of the Illinois state prisons, even though he was ultimately exonerated by those procedures. The District Court divided respondent's complaint into two parts: a claim of denial of due process under the Fourteenth Amendment to the United States Constitution by reason of the conduct of the hearing before the prison Adjustment Committee in 1976, and a claim that he was denied his "civil rights" when he was transferred to another prison in the system without a hearing. The District Court discussed the 1976 hearing in some detail, and found no violation of due process. In addition, the District Court found that respondent's transfer without a hearing raised no constitutional issue because of our decision in *Meachum* v. *Fano*, 427 U. S. 215 (1976). The court accordingly dismissed respondent's complaint.

On appeal, the Court of Appeals reversed the judgment of the District Court as to the due process claim and also sustained an Eighth Amendment claim upon which the District Court appears not to have passed. *Chavez* v. *Rowe*, 643 F. 2d 1281 (CA7 1981). The Court of Appeals stated that "Chavis' failure to name a particular defendant in connection with his Eighth Amendment allegation is no bar to this claim." *Id.*, at 1290, n. 9.

I believe that this Court should grant petitioners' request for review of the manner in which the Court of Appeals treated the respondent's due process claim. At a hearing on October 2, 1976, the Adjustment Committee dismissed the correctional officer's "ticket" as "improperly written." *Id.*, at 1283. The following week, another correctional officer who was also a member of the Adjustment Committee wrote a second "Inmate Violation Report" charging respondent with the assault and stabbing. After a series of proceedings and appeals within the Illinois prison system, the Acting Director

of the Illinois Department of Corrections, following the recommendation of a Review Board, ordered that the disciplinary report against respondent be expunged from all institutional records, that respondent be released from the segregation in which he had been confined since October, and that his two years of statutory good time be restored. *Id.*, at 1284.

The Court of Appeals thought that the system of prison disciplinary hearings and review established by the State of Illinois did not meet the standards of *Wolff* v. *McDonnell*, 418 U. S. 539 (1974). It was of the view that the Adjustment Committee's failure to disclose to respondent an investigatory report containing statements by a witness to the stabbing incident violated this Court's decisions in *Brady* v. *Maryland*, 373 U. S. 83 (1963), and *United States* v. *Agurs*, 427 U. S. 97 (1976).

This would have very likely been true had these procedures been constructed on the traditional judicial model, but I had thought one of the touchstones of prison disciplinary proceedings was that they need not be so constructed. As we said in *Wolff*, *supra*, at 556:

> "Of course, as we have indicated, the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. . . . Prison disciplinary proceedings are not a part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. Cf. *Morrissey* v. *Brewer*, 408 U. S., at 488. In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application."

Likewise in *Baxter* v. *Palmigiano*, 425 U. S. 308 (1976), we said of *Wolff:*

> "Within the reasonable limitations necessary in the prison disciplinary context, we suggested, but did not require, that the disciplinary committee 'state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases.' . . .
>
> "We were careful to distinguish between this limited right to call witnesses and other due process rights at disciplinary hearings. We noted expressly that, in comparison to the right to call witnesses, '[c]onfrontation and cross-examination present greater hazards to institutional interests.' . . . We said:
>
> > 'If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls. Proceedings would inevitably be longer and tend to unmanageability.' . . .
>
> "We therefore concluded that '[t]he better course at this time, in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons.'" 425 U. S., at 321–322, citing *Wolff* v. *McDonnell*, *supra*, at 566, 567, 569.

It seems to me that the opinion of the Court of Appeals, dealing as it does with the stabbing of a correctional officer as he was escorting a group of inmates including respondent, comes close to disavowing the principles of flexibility and experimentation expounded in *Wolff*, *supra*, and *Baxter*, *supra*, and virtually mandates a full panoply of courtroom procedures for what we have heretofore described as "diverse" and "flexible" prison dispute settlement mechanisms.

No. 80–2169. DAVIS *v.* JACOBS, PROBATION COMMISSIONER. C. A. 2d Cir.;

No. 80–6451. GIBSON *v.* BLACKBURN, WARDEN. C. A. 5th Cir.;

No. 80–6504. REED *v.* AJELLO, ATTORNEY GENERAL OF CONNECTICUT, ET AL. C. A. 2d Cir.;

No. 80–6508. WOODRUFF *v.* ALLSBROOK ET AL. C. A. 4th Cir.;

No. 80–6586. DILLARD *v.* MARKS, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 3d Cir.;

No. 80–6714. FREEMAN *v.* OLIVER ET AL. C. A. 5th Cir.;

No. 80–6732. VINSON *v.* RAINES, WARDEN. C. A. 9th Cir.;

No. 80–6757. MCCOLPIN *v.* ATKINS. C. A. 10th Cir.;

No. 80–6780. HUMPHREY *v.* OKLAHOMA ET AL. C. A. 10th Cir.;

No. 80–6818. RODZIEWICZ *v.* HILTON, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir.;

No. 80–6932. CLAYTON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir.;

No. 81–358. WILLIAMS *v.* ILLINOIS. C. A. 7th Cir.;

No. 81–5021. JOHNSON *v.* ESTELLE, WARDEN. C. A. 5th Cir.;

No. 81–5071. HENSON *v.* REDMAN, WARDEN. C. A. 3d Cir.;

No. 81–5082. PERKINS *v.* RAINES, PRISON SUPERINTENDENT. C. A. 9th Cir.;

No. 81–5118. DIXON *v.* RAINES. C. A. 9th Cir.; and

No. 81–5138. SMITH *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: No. 80–6508, 644 F. 2d 883; No. 81–5138, 660 F. 2d 493.

Opinion of JUSTICE STEVENS respecting the denial of the petitions for writs of certiorari.

The question raised by the dissenting opinion is whether the order to be entered in these 17 cases should be a dismissal or a denial. Although this question might be characterized as a procedural technicality—because its resolution is a matter of complete indifference to the litigants—the argument made in the dissent merits a response because it creates the impression that the Court's answer to this arcane inquiry demonstrates that the Court is discharging its responsibilities in a lawless manner. The impression is quite incorrect.

The petitioners in these cases are state prisoners. None of them has a meritorious claim. Their habeas corpus petitions were all dismissed by Federal District Judges, and they all unsuccessfully sought review in the United States Courts of Appeals. Because none of the petitioners obtained a certificate of probable cause, none of these cases was properly "in" the Court of Appeals and therefore 28 U. S. C. § 1254 does not give this Court jurisdiction over the petitions for certiorari. It is perfectly clear, however, that if there were merit to the petitions, the Court would have ample authority to review them in either of two ways.

First, as the Court expressly decided in 1945 in a case that is procedurally identical to these, this Court has jurisdiction under 28 U. S. C. § 1651. In *House* v. *Mayo*, 324 U. S. 42, the Court conceded that it lacked certiorari jurisdiction under the predecessor to § 1254, but squarely held that the All Writs Act, now 28 U. S. C. § 1651, authorized the Court to "grant a writ of certiorari to review the action of the court of appeals in declining to allow an appeal to it" and to review the "questions on the merits sought to be raised by the appeal."

324 U. S., at 44–45.[1] The Court has consistently followed *House* v. *Mayo* for over 35 years.[2]

Second, as the dissent notes: "[A] Circuit Justice, or this Court itself, may issue a certificate of probable cause. See *Rosoto* v. *Warden*, 83 S. Ct. 1788, 11 L. Ed. 2d 15 (1963) (Harlan, J., in chambers); *In re Hunt*, 348 U. S. 968 (1955) (Court denying certificate)." *Post*, at 918. Because we have that authority, it is part of our responsibility in processing these petitions to determine whether they have arguable

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[1] The dissenting opinion makes the entirely unwarranted assumption that *United States Alkali Export Assn.* v. *United States*, 325 U. S. 196 (1945), and its companion case, *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212 (1945), decided only a few weeks after *House*, implicitly overruled that case. In those cases, the petitioners had sought by writs of certiorari interlocutory review of orders issued by Federal District Courts, and the statutes that expressly conferred upon this Court appellate jurisdiction did not provide for interlocutory review. Despite its language that "[t]he writs may not be used as a substitute for an authorized appeal," 325 U. S., at 203, the Court reasoned that in both cases there were countervailing interests that so outweighed the interest in avoidance of piecemeal review that review by certiorari was appropriate. The holdings in *Alkali* and *De Beers* actually reinforce the holding in *House* because the interest in granting habeas relief in a deserving case clearly outweighs the interest in terminating frivolous appeals, especially when certiorari petitions are filed with this Court despite the refusals of the lower courts to grant certificates of probable cause. See Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court, 1962 S. Ct. Rev. 153, 187, and n. 158 (distinguishing *De Beers* from *House* on the ground that the former involved property rights).

[2] In *Burwell* v. *Teets*, 350 U. S. 808 (1955), and *Rogers* v. *Teets*, 350 U. S. 809 (1955), the Court granted writs of certiorari despite the refusals of the lower courts to grant certificates of probable cause. See *In re Burwell*, 350 U. S. 521 (1956). And in *In re Adamson*, 334 U. S. 834 (1948), the Court *denied* a petition for certiorari despite the denials by the lower courts of the petitioner's applications for a certificate of probable cause to appeal. See *Brown* v. *Allen*, 344 U. S. 443, 537, n. 11 (1953) (Jackson, J., concurring in result). For the proposition that *House* reflects the historically correct view of the scope of the common-law writ of certiorari, see Oaks, *supra*, at 182–189.

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merit notwithstanding the failure of a district or circuit judge to authorize an appeal to the Court of Appeals.

A complete explanation of the Court's conclusion that these cases have insufficient merit to warrant the exercise of its jurisdiction should therefore include three elements: (1) the petitioner has incorrectly invoked our jurisdiction under 28 U. S. C. § 1254 because no certificate of probable cause was issued; (2) the Court has decided not to exercise its jurisdiction under 28 U. S. C. § 1651; and (3) neither the Circuit Justice nor the Court has decided to issue a certificate of probable cause. Instead of entering detailed orders of this kind in all of these cases,[3] the Court wisely has adopted the practice of entering simple denials.[4] Ironically, the dissenters argue that this settled practice creates "more paperwork." *Post*, at 919.

As a practical matter, given the volume of frivolous, illegible, and sometimes unintelligible petitions that are filed in this Court, our work is facilitated by the practice of simply denying certiorari once a determination is made that there is no merit to the petitioner's claim. As the dissenters recognize, that determination must be made in all cases because

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[3] We do follow the practice in handling our appellate docket of treating appeals that are improperly taken as though they had been filed as petitions for certiorari and then denying them, cf. 28 U. S. C. § 2103; however, it hardly seems necessary to adopt a similar practice in the administration of our discretionary powers over certiorari petitions.

[4] It is noteworthy that Justice Frankfurter, who was especially scrupulous about jurisdictional matters, considered it entirely appropriate to deny certiorari because of a jurisdictional defect. In his opinion respecting the denial of the petition for writ of certiorari in *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 917–918 (1950), he stated:

"Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of a State court of last resort; the decision may be supportable as a matter of State law, not subject to review by this Court, even though the State court also passed on issues of federal law. A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court."

Circuit Justices have the power—and indeed the duty—to issue certificates of probable cause in proper cases. Imposing on the Court the additional burden of determining in every case whether the form of the order should be a denial or a dismissal is not a trivial matter because in many cases more time would be required in searching the record to be sure that no certificate of probable cause was issued than is required in evaluating a contention that has been unsuccessfully advanced by countless other prisoners.

For these reasons, I believe the Court correctly adheres to the practice it consistently has followed since the decision of *House* v. *Mayo* in 1945.[5]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

In *Jeffries* v. *Barksdale*, 453 U. S. 914 (1981), THE CHIEF JUSTICE, JUSTICE POWELL, and I dissented from a simple denial of the writ of certiorari, contending that the writ should

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[5] The dissenters place mistaken reliance on *Bilik* v. *Strassheim*, 212 U. S. 551 (1908). That decision was a one-line *per curiam* dismissal for want of jurisdiction of an appeal of the denial of a habeas corpus petition by a state prisoner where the Circuit Court had not granted a certificate of probable cause. The Court relied upon the Act of Mar. 10, 1908, ch. 76, 35 Stat. 40, which provides as follows:

"[F]rom a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a State court no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance." See 212 U. S., at 551, n. 1.

That Act expressly refers to this Court's jurisdiction over appeals by state prisoners of denials of habeas corpus relief by lower federal courts. Title 28 U. S. C. § 2253, by contrast, refers to the courts of appeals' jurisdiction over such appeals. Section 2253 bears on this Court's jurisdiction only because this Court's certiorari jurisdiction under 28 U. S. C. § 1254 is limited to "[c]ases in the courts of appeals."

instead be *dismissed* because we had no jurisdiction to consider it. Further reflection and research have only strengthened my belief that where a specific statutory enactment dealing with our jurisdiction to consider decisions of the courts of appeals limits that jurisdiction to "[c]ases in the courts of appeals," 28 U. S. C. § 1254, we are bound by that statutory provision just as we would be bound by any other statutory provision, unless we were to hold it violative of some provision of the Constitution.

In each of these cases, the petitioner was convicted in a state court. He then sought habeas corpus relief in a United States District Court, and the District Court dismissed the action or denied the writ and refused to issue a certificate of probable cause to appeal. Section 2253 of Title 28 of the United States Code provides as follows: "An appeal may *not* be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause" (emphasis supplied).

The effect of this statute, which could not have been drafted in plainer terms, is clear: a certificate of probable cause is an indispensable prerequisite to an appeal from the District Court to the appropriate Court of Appeals. This has long been recognized by the courts, see, *e. g.*, *Wilson* v. *Lanagan*, 79 F. 2d 702 (CA1 1935); *Hooks* v. *Fourth District Court of Appeal*, 442 F. 2d 1042 (CA5 1971), and by distinguished commentators, see, *e. g.*, Blackmun, Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases, 43 F. R. D. 343, 351 (1967). Our cases are not entirely in harmony as to their reasoning on this issue, though all concede that there is no jurisdiction to grant a writ of certiorari where both the District Court and the Court of Appeals have denied a habeas corpus petitioner a certificate of probable

cause to appeal. See *Bilik* v. *Strassheim*, 212 U. S. 551 (1908); *Ex parte Patrick*, 212 U. S. 555 (1908); *House* v. *Mayo*, 324 U. S. 42, 44 (1945). In *House*, however, this Court held that although it could not entertain a petition for certiorari, it had jurisdiction under the All Writs Act, currently codified at 28 U. S. C. § 1651, to determine the merits of the habeas petition, as well as whether the Court of Appeals had abused its discretion in denying the petitioner a certificate of probable cause to appeal. *Id.*, at 44–45. In reaching this conclusion, it relied on a series of cases interpreting the scope of the common-law writ of certiorari under the All Writs Act. See, *e. g.*, *Steffler* v. *United States*, 319 U. S. 38 (1943); *Wells* v. *United States*, 318 U. S. 257 (1943); *In re 620 Church St. Corp.*, 299 U. S. 24 (1936).

This reasoning, however, would seem to conflict with the principles established in *United States Alkali Export Assn.* v. *United States*, 325 U. S. 196, 203 (1945), and its companion case *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U. S. 212 (1945). These two cases hold that where Congress has withheld appellate review, the All Writs Act cannot be used as a substitute for an authorized appeal. Review by common-law certiorari or any other extraordinary writ is not permissible in the face of a legislative purpose to foreclose review in a particular set of circumstances. *Alkali Export*, *supra*, at 203.

Congress, in enacting 28 U. S. C. § 2253, has determined that an indispensable prerequisite to an appeal in a habeas corpus proceeding is a certificate of probable cause. The legislative history of this section demonstrates a clear congressional purpose to impose this requirement as a means of terminating frivolous appeals in habeas corpus proceedings. See H. R. Rep. No. 23, 60th Cong., 1st Sess. (1908). Undoubtedly, one of the purposes of § 2253 is to protect the States from the necessity of responding to the volume of frivolous appeals. This purpose is hardly furthered when uncertificated petitioners are permitted to seek common-law

writs of certiorari in this Court, thereby imposing a burden upon the States to respond. Where the statutory scheme permits appellate review only upon the issuance of such a certificate, review by extraordinary writ in the absence of a certificate collides with Congress' express purpose to foreclose review.*

We should not fear that a more exacting application of § 2253 will result in meritorious petitions for habeas corpus slipping by unobservant or callous Courts of Appeals, thereby evading any review by this Court. Pursuant to § 2253, a Circuit Justice, or this Court itself, may issue a certificate of probable cause. See *Rosoto* v. *Warden*, 83 S. Ct. 1788, 11 L. Ed. 2d 15 (1963) (Harlan, J., in chambers); *In re Hunt*, 348 U. S. 968 (1955) (Court denying certificate). Thus, the failure to observe the congressional mandate as to this Court's jurisdiction of a petition for certiorari to a Court of Appeals in the absence of a certificate of probable cause in no way bars consideration of the merits of a petition which any Member of this Court believes to be deserving of a certificate of probable cause.

But the practice from which I dissented in *Jeffries* v.

*Although the concurring opinion correctly notes that this Court utilized the common-law writ in *Alkali Export* to review an interlocutory order by the District Court, this hardly "reinforce[s] the holding in *House* [v. *Mayo*]." *Ante*, at 913, n. 1. The questions in *Alkali Export* involved the propriety of an exercise of the District Court's equitable jurisdiction, where there was an apparent conflict between its jurisdiction and that of the agency specifically charged by Congress with the duty of enforcing the antitrust laws under the circumstances present in that case. Thus, the common-law writ was utilized by this Court in *Alkali Export* only to determine whether the District Court's assumption of jurisdiction *conflicted with* Congress' intent to foreclose such jurisdiction pending a determination of a particularly sensitive issue by the Federal Trade Commission. *Alkali Export*, 325 U. S., at 203–204. In contrast, use of the common-law writ to review uncertificated petitions does not operate to ensure that a lower court is exercising its jurisdiction in accord with congressional intent. It has precisely the opposite effect of providing uncertificated petitioners with certiorari review in the teeth of a congressional mandate that such review should not be available.

Barksdale, 453 U. S. 914 (1981), in addition to creating more paperwork with no observable change in the results of a case, has at least two singularly undesirable side effects. Presumably a case where a Court of Appeals has refused to grant leave to appeal, and thus has neither examined the accuracy of petitioner's factual assertions nor articulated the reasons for its conclusion that petitioner's legal contentions lack merit, is not an ideal candidate for certiorari here entirely apart from the importance of the issues presented by such a petition. In *Conway* v. *California Adult Authority*, 396 U. S. 107 (1969), this Court dismissed a writ of certiorari as improvidently granted because the petitioner had misstated the facts in his petition so as to create a purely artificial and hypothetical issue.

But an even more important consequence of the disregard of congressional provisions as to our jurisdiction is a tendency to weaken the authority of this Court when it can demonstrate in a principled manner that it has either the constitutional or statutory authority to decide a particular issue. The necessary concomitant of our tripartite system of government that the other two branches of government obey judgments rendered within our jurisdiction is sapped whenever we decline for any reason other than the exercise of our own constitutional duties to similarly follow the mandates of Congress and the Executive within their spheres of authority.

No. 80–6514. HAWKINS *v.* TEXAS. Ct. Crim. App. Tex. Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 613 S. W. 2d 720.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 80–6519. JOHNSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. 736, 273 S. E. 2d 784.

JUSTICE MARSHALL, dissenting.

Petitioner, who was convicted of murder in a Virginia trial court, argues that his confession should not have been admitted into evidence. The confession was made during a police interrogation, at the outset of which petitioner waived his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Earlier that same day, however, petitioner had stated that he wished to confer with an attorney. The interrogation took place before he had an opportunity to do so. The Virginia Supreme Court ruled that there had been a valid waiver, and thus that the confession was admissible. In my view, the decision to admit the confession was contrary to the spirit—if not the letter—of our recent decision in *Edwards* v. *Arizona*, 451 U. S. 477 (1981), which was handed down after the State Supreme Court's ruling in this case. I would grant the petition for a writ of certiorari, vacate the judgment of the State Supreme Court, and remand the case for reconsideration in light of *Edwards*.

In *Edwards* v. *Arizona*, the petitioner was arrested on charges of robbery, burglary, and murder. After he was informed of his *Miranda* rights, he was questioned by police. Edwards denied involvement in the crime and presented an alibi defense. He then told police that he wanted to "make a deal." He stated, however, that he wanted to consult with an attorney first. Although questioning then ceased, police detectives visited Edwards the next day and told him that they wished to ask him some questions. Petitioner replied that he did not want to talk to anyone. After being told that he "had to" talk to the detectives, he acquiesced. The officers read Edwards his *Miranda* rights and began a new interrogation session. Shortly after the session began, petitioner implicated himself in the crime.

We reversed the Arizona Supreme Court's ruling that this confession was admissible, holding:

> "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. [Moreover,] an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards* v. *Arizona*, 451 U. S., at 484–485.

We recognized that a person in custody who had expressed a desire to have a lawyer might change his mind and even welcome an opportunity to talk. *Id.*, at 485–486. Where the accused did not himself renew discussions with the police, however, we decided that it was unsafe to assume that he had voluntarily, knowingly, and intelligently waived his right to counsel.

The facts of this case are remarkably similar to those of *Edwards* v. *Arizona*. On December 12, 1977, petitioner was arrested by Virginia authorities and charged with robbery, premeditated murder in the commission of armed robbery, and use of a firearm in the commission of murder. At his arraignment the next day, petitioner asked the court to appoint counsel. An attorney was appointed. That afternoon, however, before petitioner had an opportunity to confer with his lawyer, a local police detective visited him in jail. This detective later testified that he neither knew nor cared whether petitioner had requested an attorney. The detective informed petitioner of his *Miranda* rights and obtained peti-

tioner's signature on a waiver form. He then initiated an interrogation session. During the course of this interrogation, petitioner confessed. Before his trial, petitioner moved to suppress the confession, arguing that he had not knowingly and intelligently waived his right to counsel. The trial court ruled the confession admissible and the Virginia Supreme Court affirmed. Petitioner was subsequently convicted.[1]

Under the circumstances, I think it clear that *Edwards* bars the use of petitioner's confession. Having exercised his right to consult with an attorney, petitioner should not have been subjected to interrogation by the authorities until counsel had been made available. The State attempts to distinguish *Edwards* on two grounds. First, it points out that Edwards clearly expressed his desire to deal with police only through counsel, whereas petitioner here simply asked that an attorney be appointed. However, an accused is under no obligation to state precisely why he wants a lawyer. If we were to distinguish cases based on the wording of an accused's request, the value of the right to counsel would be substantially diminished. As we stated in *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979), "an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease."

Second, the State notes that Edwards informed the police of his desire for an attorney, whereas petitioner only in-

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[1] The trial court ruled that the confession was admissible after conducting a suppression hearing. Petitioner was tried before a jury and found guilty of murder. On appeal, the Virginia Supreme Court sustained the trial court's ruling on the suppression motion. *Johnson* v. *Commonwealth*, 220 Va. 146, 255 S. E. 2d 525 (1979). The conviction was reversed on other grounds, however. A new trial was held, and petitioner renewed his motion to suppress the confession. This motion was denied. Petitioner was once again found guilty of murder. On appeal from this conviction, he asked the Virginia Supreme Court to reconsider its prior holding, but the court refused to grant a writ of error on this issue.

formed the judge at his arraignment. The State suggests that since the police did not know about petitioner's request, the interrogation was not improper. However, the police could easily have determined whether petitioner had already exercised his right to counsel; presumably, a prosecutor was present at the arraignment. They did not know about petitioner's request for a lawyer only because they made no effort to determine whether such a request had been made. But even if the police could not have discovered that petitioner had expressed a desire for an attorney, I would hold that the confession should not have been admitted. The key question in this case is whether petitioner's waiver of his right to counsel was knowing, intelligent, and voluntary. In determining whether these conditions were satisfied, the fact that the police were unaware of a prior request for counsel is only tangentially relevant. What is important, rather, is the state of mind of the accused. I think it is no more safe to assume that a waiver is valid when an accused has made a prior request to the judge at his arraignment than when he has made the request to police. In both cases, the accused informs an individual in authority that he would like an attorney—and yet shortly thereafter, state officials, apparently disregarding his request, ask him to waive his rights.[2]

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[2] This petition was not timely filed under Rule 20.1 of the Rules of this Court, which provides that a petition for certiorari to review a state court's judgment in a criminal case "shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment." However, this time requirement is not jurisdictional and may be waived by the Court "in the exercise of its discretion when the ends of justice so require." *Schacht* v. *United States*, 398 U. S. 58, 64 (1970) (interpreting predecessor to Rule 20.1, old Rule 22(2)); see also *Sanabria* v. *United States*, 437 U. S. 54, 62, n. 12 (1978) (same). I believe that waiver would be appropriate here because the Virginia Supreme Court's decision is so clearly in conflict with *Edwards*.

No. 80–6704. WHITE *v.* UNITED STATES; and

No. 80–6759. ANDERSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 208 U. S. App. D. C. 289, 648 F. 2d 29.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Two Terms previous, I dissented from a denial of certiorari that left the state and lower federal courts in conflict and confusion over whether an anonymous tip may furnish reasonable suspicion for an investigatory detention. *Jernigan* v. *Louisiana*, 446 U. S. 958 (1980). Because it remains apparent that this difficult issue of everyday importance to law enforcement officials and citizens on the street alike requires resolution here, I am again moved to note my dissent.

The District of Columbia Police received an anonymous telephone call informing them that a young black man known as "Nicky" and wearing a blue jumpsuit had parked his 1971 Ford at No. 1 15th Street, N. E., entered a 1974 Oldsmobile, and driven away. The caller, who further identified the cars by color and license number, said that "Nicky" and the unidentified driver of the Oldsmobile were involved in narcotics traffic and would be "dirty" with drugs when they returned. The caller refused to identify himself or how he obtained this information.

Upon receipt of the tip, two police officers, working out of uniform, established surveillance at the address given. They observed the Oldsmobile returning with a black male passenger in a blue sweatsuit, but saw no suspicious activity. The officers pulled their unmarked cruiser alongside the Oldsmobile partially blocking its access, displayed police identification, approached the car with guns drawn, and ordered the men, the petitioners in these cases, out of their automobile. Heroin and narcotics paraphernalia were subsequently discovered, leading to the men's arrest and conviction for possession of and intent to distribute heroin.

A divided panel of the United States Court of Appeals for the District of Columbia Circuit affirmed the trial court's denial of petitioners' motion to suppress the evidence seized from the Oldsmobile as the fruit of an invalid investigatory stop. 208 U. S. App. D. C. 289, 648 F. 2d 29 (1981). The majority first determined that the actions of the police should be treated as a brief investigatory detention, *Terry* v. *Ohio*, 392 U. S. 1 (1968), instead of an arrest.[1] It then concluded that the stop was valid because of the specificity of the descriptions provided and the verification of that information by the police. Judge Edwards strongly dissented on both points. The majority admitted that "[t]he question whether an anonymous tip corroborated only by observation of innocent details justifies a *Terry* stop is a live and disputed one," 208 U. S. App. D. C., at 303, 648 F. 2d, at 43.

Arguably, the decision of the Court of Appeals is inconsistent with our prior cases which require that reasonable suspicion be based on a sufficiently reliable informant's tip. In *Adams* v. *Williams*, 407 U. S. 143 (1972), we not only recognized that "[s]ome tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of the suspect would be authorized," *id.*, at 147, but also explicitly noted that *Adams* presented a stronger case "than obtains in the case of an anonymous telephone tip," *id.*, at 146. Informers who have provided accurate tips in the past, *e. g.*, *Terry*, *supra*, or who offer tips that can be immediately confirmed on the scene, *e. g.*, *Adams*, *supra*, stand on a much firmer ground of reliability than anonymous telephone callers.

Other Federal Courts of Appeals have taken widely divergent positions on the reliability of an unidentified tipster. Compare *United States* v. *McLeroy*, 584 F. 2d 746 (CA5 1978), and *United States* v. *Robinson*, 536 F. 2d 1298 (CA9

[1] The Government concedes that the tip did not provide probable cause for arrest at the time the officers approached the car. 208 U. S. App. D. C., at 292, 648 F. 2d, at 32. See *Aguilar* v. *Texas*, 378 U. S. 108 (1964).

1976) (no reasonable suspicion), with *United States* v. *Rodriguez Perez*, 625 F. 2d 1021 (CA1 1980), and *United States* v. *Andrews*, 600 F. 2d 563 (CA6) (reasonable suspicion), cert. denied, 444 U. S. 878 (1979). Compare *United States* v. *DeVita*, 526 F. 2d 81 (CA9 1975) *(per curiam)* (known but untested informant; no reasonable suspicion), with *United States* v. *Gorin*, 564 F. 2d 159 (CA4 1977) (known informer but no proof of reliability; reasonable suspicion found), cert. denied, 434 U. S. 1080 (1978). The state courts are in similar disarray.[2]

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[2] For cases finding that an anonymous tip with corroboration of innocent details does not establish reasonable suspicion, see *Jackson* v. *State*, 157 Ind. App. 662, 301 N. E. 2d 370 (1973); *Commonwealth* v. *Cruse*, 236 Pa. Super. 85, 344 A. 2d 532 (1975); *State* v. *Wilson*, 366 So. 2d 1328 (La. 1978); *Commonwealth* v. *Anderson*, 481 Pa. 292, 393 A. 2d 1298 (1978); *Conor* v. *State*, 260 Ark. 172, 538 S. W. 2d 304 (1976); *Ebarb* v. *State*, 598 S. W. 2d 842 (Tex. Crim. App. 1980); *State* v. *Sieler*, 95 Wash. 2d 43, 621 P. 2d 1272 (1980) (en banc).

For decisions finding reasonable suspicion, see *State* v. *Hobson*, 95 Idaho 920, 523 P. 2d 523 (1974); *People* v. *Taggart*, 20 N. Y. 2d 335, 229 N. E. 2d 581 (1967), appeal dism'd, 392 U. S. 667 (1968); *State* v. *Barton*, 92 N. M. 118, 584 P. 2d 165 (1978); *State* v. *Kea*, 61 Haw. 566, 606 P. 2d 1329 (1980); *Radowick* v. *State*, 145 Ga. App. 231, 244 S. E. 2d 346 (1978); *Henighan* v. *United States*, Crim. No. 80–169 (D. C. Ct. App., June 10, 1981); *State* v. *Webb*, 398 So. 2d 820 (Fla. 1981); *State* v. *Hasenbank*, 425 A. 2d 1330 (Me. 1981); *Mann* v. *State*, 525 S. W. 2d 174 (Tex. Crim. App. 1975); *People* v. *Tooks*, 403 Mich. 568, 271 N. W. 2d 503 (1978).

While the determination of reasonable suspicion is heavily dependent on the specificity of the information, the amount of verification, and the urgency of a particular situation, the conflicting results cannot be explained as accounting for different factual patterns. Compare *People* v. *De Bour*, 40 N. Y. 2d 210, 352 N. E. 2d 562 (1976) (anonymous call that black man in bar wearing red shirt had gun; no reasonable suspicion), with *State* v. *Jernigan*, 377 So. 2d. 1222 (La. 1979) (anonymous call that black man in bar wearing yellow shirt and blue pants had gun; reasonable suspicion), cert. denied, 446 U. S. 958 (1980). Also compare *Jackson* v. *State*, *supra* (anonymous call that man in car, precisely located, had gun; no reasonable suspicion), with *People* v. *Taggart*, *supra* (anonymous call that man on corner, precisely located, had gun; reasonable suspicion).

While I find the conflict in the federal and state courts sufficient reason to grant certiorari, the argument for doing so is especially strong when such uncertainty involves a fundamental aspect of law enforcement operations. Similar investigatory stops are conducted daily on the Nation's streets. Moreover, because of the lesser quantum of evidence required, *Terry* stops are likely to involve innocent citizens. Here, where not only is the detention on the "outermost perimeters of the *Terry* doctrine," 208 U. S. App. D. C., at 303, 648 F. 2d, at 43, but also at the very intersection between brief stops and full-scale arrests, the overall judgment of reasonableness under the Fourth Amendment is very seriously drawn into question. Conversely, the "Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams* v. *Williams*, *supra*, at 145. Because clarification of the boundaries of legitimate police activity under the Constitution is ultimately this Court's responsibility, I would grant certiorari.

No. 81–167. PAN-ISLAMIC TRADE CORP. *v.* EXXON CORP. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 632 F. 2d 539.

No. 81–191. NEEDHAM *v.* WHITE LABORATORIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 639 F. 2d 394.

JUSTICE REHNQUIST, dissenting.

Because I believe that the Court of Appeals in this case misapplied the Federal Rules of Appellate Procedure and this Court's decision in *Thompson* v. *INS*, 375 U. S. 384 (1964), I dissent from the denial of certiorari.

In 1952, petitioner's mother took dienestrol, a synthetic estrogen, during her pregnancy with petitioner. In early

1974, petitioner's physician informed her that she had a vaginal cancer. Alleging that her mother's use of dienestrol was the proximate cause of her cancer, petitioner brought this diversity suit under Illinois tort law. After trial, the jury returned a verdict and awarded petitioner $800,000 in damages.

Within 10 days of this judgment, respondent filed a motion for judgment notwithstanding the verdict pursuant to Federal Rule of Civil Procedure 50(b). The timely filing of this post-trial motion tolled the 30-day period in which to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(4). The District Court denied the motion on January 14, 1980. Thus, the 30-day period began to run anew, terminating on February 14, 1980. On February 4, 1980, respondent filed a motion styled as a "motion for reconsideration" of the January 14 order denying its motion for judgment notwithstanding the verdict. At a subsequent hearing, the District Court erroneously informed counsel that respondent's "motion to reconsider" tolled the time for appeal. Respondent did not move for, and the District Court did not grant, an extension of time within which to appeal under Federal Rule of Appellate Procedure 4(a)(5). The District Court denied the "motion to reconsider" on March 20, 1980. Respondent filed notice of appeal on April 21, 1980, 99 days subsequent to the order of January 14 denying respondent's motion for judgment notwithstanding the verdict.

A divided Court of Appeals held that it had jurisdiction to hear the appeal. 639 F. 2d 394 (CA7 1981). After conceding that respondent's "motion to reconsider" did not toll the 30-day period that began to run when the Rule 50(b) motion was denied, the court held that this case fell within "the narrow exception recognized" in *Thompson* v. *INS*, *supra*. The court held that *Thompson* applied because respondent "should not be penalized for relying on the district court assurance that notice of appeal filed within thirty days of its

disposition of the motion to reconsider would be timely." 639 F. 2d, at 398.

Chief Judge Fairchild dissented. Following entry of an order denying respondent's Rule 50(b) motion, he argued, an extension of time under Federal Rule of Appellate Procedure 4(a)(5) was the sole method by which the running of the time for appeal could be extended. Moreover, the *Thompson* exception was "too narrow" to fit the situation in the instant case. "In *Thompson*, the Court predicated its holding *not only* on reliance on the district court's conclusion that a motion had been properly filed, but also upon appellant's *performing* 'an act which, if properly done, postponed the deadline for the filing of his appeal.'" 639 F. 2d, at 404 (emphasis added). In *Thompson*, the appellant filed an untimely but unchallenged post-trial motion. In contrast, respondent's filing of the "motion to reconsider" was not an act which, if properly done, would postpone the deadline for appeal. The Court of Appeals for the Seventh Circuit denied rehearing with three judges dissenting.

The Federal Rules of Appellate Procedure, promulgated in 1967, are quite simple and explicit in setting forth the procedures with which a litigant must comply in order to invoke the jurisdiction of the Court of Appeals. An appeal is taken by filing a timely notice of appeal with the District Court. Fed. Rule App. Proc. 3. Notice must be filed within 30 days after the date of entry of the judgment or order appealed from. Fed. Rule App. Proc. 4(a)(1). Four, and only four, timely post-trial motions will toll the running of the 30-day period until disposition by the District Court: (1) a motion for judgment notwithstanding the verdict under Federal Rule of Civil Procedure 50(b); (2) a motion under Rule 52(b) to amend or make additional findings of fact; (3) a motion to alter or amend the judgment under Rule 59(e); (4) a motion for a new trial under Rule 59(a). Fed. Rule App. Proc. 4(a)(4). Compliance with Rule 4 is mandatory and jurisdictional. *Brow-*

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der v. *Director, Ill. Dept. of Corrections*, 434 U. S. 257, 264 (1978) (citing cases). The clear purpose of Rule 4(a) is to set a definite point in time when litigation shall be at an end, so that the prospective appellee will know that he is freed of the appellant's demands. *Ibid.* The purposes behind the 30-day rule are so important that a Court of Appeals is barred from extending the time period. Fed. Rule App. Proc. 26(b). The barrier of the 30-day rule is not impenetrable, however, for the Rules provide that the District Court may, "upon a showing of excusable neglect or good cause," extend the time for filing a notice of appeal. Fed. Rule App. Proc. 4(a)(5). But even then, a District Court may grant such a motion only up to 30 days after the expiration of the time period. *Ibid.*

It is thus clear that respondent could not extend its time for filing a notice of appeal by its "motion to reconsider" the District Court's order denying respondent's previous motion for judgment notwithstanding the verdict. A "motion to reconsider" is not recognized by Rule 4(a)(4) as one that will extend the filing period.[1] The Court of Appeals correctly recognized this fact, as has this Court. *Browder* v. *Director, Ill. Dept. of Corrections*, *supra*, at 264–265.

The Court of Appeals' reliance on *Thompson* v. *INS*, *supra*, however, is misplaced. In that case, the appellant filed an untimely but otherwise proper post-trial motion with the District Court. The appellee raised no objection to the timeliness of the motion and the District Court erroneously determined that the post-trial motion was filed "in ample time." Appellant filed his notice of appeal within 60 days[2] of

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[1] Such a motion is not recognized by any of the Federal Rules of Civil Procedure.

[2] At the time, appeals to the Court of Appeals were governed by Federal Rule of Civil Procedure 73, the predecessor to Federal Rule of Appellate Procedure 4. That Rule allowed for a 60-day period in which to file a notice of appeal with the District Court.

the denial of the post-trial motion, but not within 60 days of the original entry of judgment by the District Court. Appellee moved to dismiss the appeal because the untimely motion could not serve to toll the running of the time for appeal. Over four dissents, this Court reversed the Court of Appeals' dismissal of the appeal. "Here . . . petitioner did an act which, if properly done, postponed the deadline for the filing of his appeal. Here . . . the District Court concluded that the act had been properly done. Here . . . the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline beyond the old deadline." 375 U. S., at 387.

Thus, in order to invoke the *Thompson* exception, the appellant must satisfy two prerequisites: (1) he must rely on a statement by the District Court and (2) he must perform an act which, if timely done, would toll the time period. Even if the first element has been met in this case, it is clear that respondent's "motion to reconsider" could not, under any circumstances, toll the 30-day period. In contrast to the expressly authorized but untimely motion in *Thompson*, respondent's "motion to reconsider" in this case is not recognized by the Rules as one which, if timely filed, would toll the period for appeal. Rule 4(a)(4) clearly contemplates that only the initial motion of the type specified will toll the time for appeal until the motion is disposed of by the District Court. *Wansor* v. *George Hantscho Co.*, 570 F. 2d 1202, 1206 (CA5 1978), cert. denied, 439 U. S. 953 (1979). 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice ¶ 204.12[1] (2d ed. 1980). Thus, respondent's reliance on an erroneous assertion by the District Court is insufficient to invoke an implied exception to Rule 4's explicit and simple commands.

Under the 1979 amendments to the Federal Rules of Appellate Procedure, respondent had a means by which it could

extend the filing period so that the District Court could "reconsider" the initial post-trial motion without depriving respondent of an appeal. Rule 4(a)(5) authorizes the District Court to grant an extension of time in which to file notice of appeal. Respondent could have made such a request up to 60 days after the District Court had initially denied respondent's post-trial motion. Since the Rules provide one means by which respondent could preserve its time to appeal, there was no justification for the Court of Appeals to imply a different one in this situation.

Although it is unfortunate that respondent may have been misled by the District Court, a litigant is bound by the rules of procedure, just as he is by the rules of substantive law. A litigant is no more entitled to conclusively rely on a District Court's view of a rule of procedure than he is as to its view on matters of substantive law.

I would therefore grant a writ of certiorari in this case and reverse the Court of Appeals' decision. The Federal Rules of Appellate Procedure govern all cases on appeal in the federal system, and patchwork exceptions to them will do far greater harm to the system than an occasional random departure on a point of substantive law.

No. 81–260. EXXON CORP. *v.* GEORGIA ASSOCIATION OF PETROLEUM RETAILERS. C. A. 5th Cir. Motion of Georgia Oilmen's Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 644 F. 2d 1030.

No. 81–319. KIMMEL *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: —— Ind. ——, 418 N. E. 2d 1152.

No. 81–5038. DEMPS *v.* FLORIDA. Sup. Ct. Fla.;

No. 81–5169. JACOBS *v.* FLORIDA. Sup. Ct. Fla.;

No. 81–5192. DICKS *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 81–5271. SWINDLER *v.* ARKANSAS. Sup. Ct. Ark.; and

No. 81–5336. MARTIN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: No. 81–5038, 395 So. 2d 501; No. 81–5169, 396 So. 2d 1113; No. 81–5192, 615 S. W. 2d 126; No. 81–5271, 272 Ark. 340, 617 S. W. 2d 1; No. 81–5336, 303 N. C. 246, 278 S. E. 2d 214.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 81–5189. MERCER *v.* MISSOURI. Sup. Ct. Mo. Motion of ACLU of Western Missouri for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 618 S. W. 2d 1.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 81–5296. FIERRO *v.* MACDOUGALL, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 648 F. 2d 1259.

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Affirmed on Appeal

No. 81–240. MORRIS, MARYLAND STATE ADMINISTRATOR OF ELECTION LAWS, ET AL. *v.* MATHERS ET AL. Appeal from C. A. 4th Cir. The order dismissing the appeal for want of substantial federal question is hereby vacated [see Reporter's Note, *ante*, p. 884]. The judgment is affirmed. Reported below: 649 F. 2d 280.

Appeals Dismissed

No. 81–268. SCOTT ET AL. *v.* DUMAS ET AL. Appeal from Ct. App. La., 1st Cir., dismissed for want of substantial federal question. Reported below: 396 So. 2d 378.

No. 81–317. WEINBERGER *v.* FLORIDA BAR. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 397 So. 2d 661.

No. 81–342. CASILLAS *v.* S.W.I.G. ET AL. Appeal from Ct. App. N. M. dismissed for want of substantial federal question. Reported below: 96 N. M. 84, 628 P. 2d 329.

Certiorari Granted—Reversed and Remanded. (See No. 80–2041, *ante*, p. 1.)

Certiorari Granted—Vacated and Remanded

No. 80–1816. PARRATT, WARDEN *v.* FORD. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Sumner* v. *Mata*, 449 U. S. 539 (1981). Reported below: 638 F. 2d 1115.

No. 81–397. BUREAU OF ECONOMIC ANALYSIS, UNITED STATES DEPARTMENT OF COMMERCE *v.* LONG ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the Economic Recovery Tax Act of 1981, Section 701, 95 Stat. 340, Pub. L. 97–34. Reported below: 646 F. 2d 1310.

Miscellaneous Orders

No. A–21. SAYLES *v.* HART, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Application to recall and stay the mandate, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A–216. BOYD *v.* UNITED STATES. Application for bail, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D–228. IN RE DISBARMENT OF FRY. Disbarment entered. [For earlier order herein, see 450 U. S. 1038.]

No. D–232. IN RE DISBARMENT OF MCCLELLAN. Disbarment entered. [For earlier order herein, see 450 U. S. 1038.]

No. D–234. IN RE DISBARMENT OF FONTAINE. Disbarment entered. [For earlier order herein, see 451 U. S. 967.]

No. D–235. IN RE DISBARMENT OF WILLIAMS. Disbarment entered. [For earlier order herein, see 451 U. S. 967.]

No. D–236. IN RE DISBARMENT OF ROSENBLUM. Disbarment entered. [For earlier order herein, see 451 U. S. 967.]

No. D–238. IN RE DISBARMENT OF NATALE. Disbarment entered. [For earlier order herein, see 451 U. S. 979.]

No. D–240. IN RE DISBARMENT OF WALSH. Disbarment entered. [For earlier order herein, see 452 U. S. 902.]

No. D–242. IN RE DISBARMENT OF CASKEY. Disbarment entered. [For earlier order herein, see 452 U. S. 935.]

No. D–244. IN RE DISBARMENT OF IVLER. It is ordered that George Ivler, of Paterson, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–245. IN RE DISBARMENT OF PRESSMAN. It is ordered that Robert M. Pressman, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–246. IN RE DISBARMENT OF KAHN. It is ordered that Richard Stephen Kahn, of Essex, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–247. IN RE DISBARMENT OF COSTELLO. It is ordered that Thomas M. Costello, Sr., of Southfield, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–248. IN RE DISBARMENT OF HOLOBER. It is ordered that Dennis Holober, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80–1285. BROWN *v.* HARTLAGE. Ct. App. Ky. [Certiorari granted, 450 U. S. 1029.] L. Stanley Chauvin, Jr., Esquire, of Louisville, Ky., a member of the Bar of this Court, is invited to brief and argue this case as *amicus curiae* in support of the judgment below.

No. 80–1417. MILLS ET AL. *v.* ROGERS ET AL. C. A. 1st Cir. [Certiorari granted *sub nom. Okin* v. *Rogers*, 451 U. S. 906.] Motion of respondents to dismiss the writ of certiorari or in the alternative to certify certain questions to the Supreme Judicial Court of Massachusetts denied.

No. D–249. IN RE DISBARMENT OF BEATTY. It is ordered that Elmer S. Beatty, Jr., of Verona, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–250. IN RE DISBARMENT OF DONOVAN. It is ordered that Robert C. Donovan, of San Jose, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80–5861. WILLIAMS *v.* LUCKY. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Motion of petitioner to consolidate this case with No. 80–6298, *Mills* v. *Habluetzel* [probable jurisdiction noted, 451 U. S. 936], denied.

No. 86, Orig. LOUISIANA *v.* MISSISSIPPI ET AL. It is ordered that Charles J. Meyers, Esquire, of Denver, Colo., be, and he is hereby, appointed Special Master in this case with authority to fix the time and conditions for filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

It is further ordered that if the position of Special Master becomes vacant during a recess of Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein. [For earlier order herein, see 445 U. S. 957.]

No. 80–1925. UNITED TRANSPORTATION UNION *v.* LONG ISLAND RAILROAD CO. ET AL. C. A. 2d Cir. [Certiorari granted, 452 U. S. 960.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted. Motion of American Public Transit Association for leave to participate in oral argument as *amicus curiae* denied.

No. D–251. IN RE DISBARMENT OF GOLD. It is ordered that Frederick B. Gold, of Birmingham, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 81–656. CONSOLIDATED FOODS CORP. *v.* UNGER. C. A. 7th Cir. Motion of petitioner to consolidate this case with No. 80–6045, *Kremer* v. *Chemical Construction Corp.* [certiorari granted, 452 U. S. 960], denied.

No. 81–5332. IN RE BAXLEY. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 81–244. LORETTO *v.* TELEPROMPTER MANHATTAN CATV CORP. ET AL. Appeal from Ct. App. N. Y. Probable jurisdiction noted. Reported below: 53 N. Y. 2d 124, 423 N. E. 2d 320.

No. 81–328. RODRIGUEZ ET AL. *v.* POPULAR DEMOCRATIC PARTY ET AL. Appeal from Sup. Ct. P. R. Probable jurisdiction noted. Reported below: —— P. R. R. ——.

No. 81–341. GREENE ET AL. *v.* LINDSEY ET AL. Appeal from C. A. 6th Cir. Probable jurisdiction noted. Reported below: 649 F. 2d 425.

Certiorari Granted

No. 81–280. GENERAL BUILDING CONTRACTORS ASSN., INC. *v.* PENNSYLVANIA ET AL.;

No. 81–330. UNITED ENGINEERS & CONSTRUCTORS, INC. *v.* PENNSYLVANIA ET AL.;

No. 81–331. CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA ET AL. *v.* PENNSYLVANIA ET AL.;

No. 81–332. GLASGOW, INC. *v.* PENNSYLVANIA ET AL.; and

No. 81–333. BECHTEL POWER CORP. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 648 F. 2d 923.

No. 81–5321. ENMUND *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 399 So. 2d 1362.

Certiorari Denied

No. 80–2083. SHEPHERD *v.* SHEPHERD. Sup. Ct. Ga. Certiorari denied. Reported below: 247 Ga. 273, 275 S. E. 2d 317.

No. 80–2156. GENERAL DEVELOPMENT & SHIPPING ENTERPRISES CO., LTD. *v.* MOREWITZ, ADMINISTRATOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 491.

No. 80–6812. SCRUGGS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 80–6883. PITTS *v.* SPARKS, ASSISTANT DISTRICT ATTORNEY. C. A. 5th Cir. Certiorari denied. Reported belog: 644 F. 2d 32.

No. 81–86. LITTLE MOTOR CO. *v.* SUITS. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 883.

No. 81–106. EHRLICH ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 643 F. 2d 634.

No. 81–114. DEFELICE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 641 F. 2d 1169.

No. 81–117. PORTER *v.* GUAM PUBLICATIONS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 643 F. 2d 615.

No. 81–119. MORROW ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 227 Ct. Cl. 290, 647 F. 2d 1099.

No. 81–183. MAGMA COPPER CO. *v.* SECRETARY OF LABOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 645 F. 2d 694.

No. 81–192. GANNON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 684 F. 2d 433.

No. 81–242. FISCHER *v.* VONCK. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 614 S. W. 2d 22.

No. 81–250. CHILDERS ET AL. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 918.

No. 81–254. HOROWITZ ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 399 So. 2d 1156.

No. 81–264. PRESBYTERIAN HOSPITAL OF DALLAS *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 1381.

No. 81–266. BRADLEY *v.* COMPUTER SCIENCES CORP., INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 643 F. 2d 1029.

No. 81–304. CAMPO SLACKS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1069.

No. 81–318. DENT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 400 So. 2d 1079.

No. 81–338. INMAN ET AL. *v.* BROCK ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 622 S. W. 2d 36.

No. 81–344. HERNANDEZ *v.* FAIR. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 116 Cal. App. 3d 868, 172 Cal. Rptr. 379.

No. 81–346. SEATTLE CRESCENT CONTAINER SERVICE *v.* PORT OF SEATTLE. Ct. App. Wash. Certiorari denied. Reported below: 28 Wash. App. 508, 624 P. 2d 1168.

No. 81–366. SUN SHIP, INC. *v.* MURPHY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1071.

No. 81–368. RADIO BROADCASTING CO. *v.* FRANKLIN TOWN CORP. ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 55 Pa. Commw. 147, 423 A. 2d 444.

No. 81–372. WHITE *v.* OFFICE OF PERSONNEL MANAGEMENT ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 207, 659 F. 2d 253.

No. 81–375. DOWELL DIVISION OF DOW CHEMICAL CO. *v.* FRANCONIA SEA TRANSPORT, LTD. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1058.

No. 81–382. BUCIO-REYES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 934.

No. 81–387. MORRIS *v.* CITY OF MIDLAND, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 1116.

No. 81–392. KENEALY *v.* UNITED STATES; and

No. 81–393. KENEALY ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 646 F. 2d 699.

No. 81–407. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 66.

No. 81–414. TROIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 911.

No. 81–427. DAVIS *v.* DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. D. C. Cir. Certiorari denied. Reported below: 209 U. S. App. D. C. 202, 652 F. 2d 195.

No. 81–443. NICHOLLS *v.* NASH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 171.

No. 81–448. WILSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1074.

No. 81–453. LABRIOLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1063.

No. 81–5129. DEFALCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 2d 915.

No. 81–5156. MASIELLO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 928.

No. 81–5177. BAGLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 641 F. 2d 1235.

No. 81–5188. REID *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 270.

No. 81–5279. DAVIS *v.* G.M.C. OLDSMOBILE DIVISION. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 932.

No. 81–5319. BONNER ET AL. *v.* WYRICK, WARDEN, MISSOURI STATE PENITENTIARY, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 650 F. 2d 150.

No. 81–5320. SETTLE *v.* SETTLE. Sup. Ct. N. H. Certiorari denied. Reported below: 121 N. H. 397, 430 A. 2d 172.

No. 81–5325. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5326. EASTER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 615 S. W. 2d 719.

No. 81–5330. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5331. VANDERDOES *v.* ST. CLAUDE GENERAL HOSPITAL ET AL. Sup. Ct. La. Certiorari denied. Reported below: 401 So. 2d 977.

No. 81–5334. MONROE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 400 So. 2d 753.

No. 81–5335. OWENS *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 58.

No. 81–5339. HOLMES *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 81–5341. WELCH *v.* GARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 929.

No. 81–5342. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5343. COVINGTON *v.* DAVIS. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 919.

No. 81–5347. GONZALES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–5375. SCOTT *v.* LAFOY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 292.

No. 81–5377. COUCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 652 F. 2d 1000.

No. 81–5397. CARTER *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 226 Ct. Cl. 635, 652 F. 2d 68.

No. 81–5419. KUBASIAK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 659 F. 2d 1085.

No. 81–5430. HOWARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 654 F. 2d 522.

No. 81–5437. COMBS *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–5440. GREEN *v.* CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 653 F. 2d 1022.

No. 81–5445. NICKERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 665 F. 2d 1047.

No. 81–5450. WARDEN *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 657 F. 2d 273.

No. 81–5460. RED HORSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 654 F. 2d 527.

No. 81–5467. WOODS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 661 F. 2d 937.

No. 81–5468. SPRECHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 651 F. 2d 600.

No. 81–5473. BRADFORD ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 661 F. 2d 937.

No. 81–5477. BERRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 661 F. 2d 938.

No. 80–1494. UNITED AIR LINES, INC. *v.* DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 814.

JUSTICE WHITE, dissenting.

Petitioner maintains operations and maintenance facilities for its aircraft at San Francisco International Airport. Re-

spondent, the Division of Occupational Safety and Health (formerly Division of Industrial Safety) of the Department of Industrial Relations of the State of California (Cal/OSH), is responsible for a state occupational safety and health enforcement program, approved by the federal Occupational Safety and Health Administration under 29 U. S. C. § 667(c). The state enforcement plan applies to all places of employment in California "except a place the health and safety jurisdiction over which is vested by law in, and actively exercised by, any state or federal agency other than [Cal/OSH]." Cal. Lab. Code Ann. § 6303(a) (West Supp. 1981). Under § 605(b) of the Federal Aviation Act, 72 Stat. 778, as amended, 49 U. S. C. § 1425(b), the Federal Aviation Administrator is required to

> "employ inspectors who shall be charged with the duty (1) of making such inspections of aircraft, aircraft engines, propellers, and appliances designed for use in air transportation, during manufacture, and while used by an air carrier in air transportation, as may be necessary to enable the Secretary of Transportation to determine that such aircraft, aircraft engines, propellers, and appliances are in safe condition and are properly maintained for operation in air transportation . . . ."

Petitioner contends that the operation of the federal scheme of Federal Aviation Administration (FAA) supervision pre-empts enforcement of the state scheme by Cal/OSH.

Between June 1976 and August 1978, Cal/OSH conducted a number of inspections of petitioner's San Francisco facilities. As a result of these inspections, a number of citations were issued, alleging violations of various health and safety standards. In each instance, United contested the citations, arguing that Cal/OSH lacked jurisdiction over its facilities because of pre-emption by the FAA. Prior to the completion of litigation in the state agencies and courts, United filed a complaint in Federal District Court, seeking declaratory and injunctive relief against further Cal/OSH inspections and ci-

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tations.* Specifically, United alleged that the actions of the defendants were "beyond their jurisdictional authority, interfer[ed] with and disrupt[ed] the federal statutory scheme with respect to safety . . . and violate[d] United's right to due process of law." The District Court granted petitioner a preliminary injunction prohibiting further enforcement by Cal/OSH or the Appeals Board. The Court of Appeals for the Ninth Circuit reversed, holding that the complaint should be dismissed for lack of subject-matter jurisdiction. 633 F. 2d 814 (1980).

The Court of Appeals confused two distinct lines of reasoning. One of these lines I find unobjectionable, although improperly applied in this case; the other, however, substantially misread our previous cases on when the "defensive" character of a federal question is insufficient to create federal-court jurisdiction. The first argument noted simply that the mere fact that California has incorporated a body of federal law as the basis for a state-law distinction does not necessarily cause a case under the state law to be also a case under the law of the United States. Had United raised only the question of the meaning of the limits on § 6303(a)'s grant of authority to Cal/OSH, this would have been correct and sufficient to dispose of the case. United's complaint, however, was not so limited. Petitioner alleged that the state action interfered with and disrupted the federal statutory scheme. This can only be read as a claim of federal pre-emption. The Court of Appeals responded, erroneously in my view, to this issue of pre-emption by characterizing it as defensive and an inadequate basis for federal-court jurisdiction:

> "In the instant case, United is a defendant in the state court action to enforce citations issued by the Division,

*Petitioner also sought to enjoin the Occupational Safety and Health Appeals Board of the State of California from conducting further proceedings related to enforcement of the citations already issued.

and has stated that it has asserted and will continue to assert jurisdictional defenses in that action. Therefore, United's allegations of federal question jurisdiction in this appeal remain defensive in nature, and it cannot assert its jurisdictional objections to the state court action as a basis for jurisdiction in the federal courts." 633 F. 2d, at 817.

In *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149 (1908), the plaintiff in Federal District Court had settled a claim against a railroad in exchange for a continuing free pass, a contract which the railroad, it was alleged, would no longer honor because of a recently passed federal statute. The plaintiff sought a judgment as to whether the Act forbade the free pass and, if it did, whether it was constitutional as applied in the circumstances. This Court held that the case was not a suit arising under the laws of the United States: "It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some [federal law]." *Id.*, at 152. Other cases are to the same effect. *Tennessee* v. *Union & Planters Bank*, 152 U. S. 454 (1894); *Metcalf* v. *Watertown*, 128 U. S. 586 (1888).

In each of the above cases, the federal plaintiff's cause of action against the defendant was not grounded in federal law; he merely sought to adjudicate the validity of an anticipated defense to his action. Here, United's complaint, as I read it, included the claim that under federal law the FAA had exclusive jurisdiction to oversee safety at airline maintenance facilities and therefore, under the Supremacy Clause, state regulation was foreclosed. No part of this claim was grounded in state law.

In *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947), the Illinois Commerce Commission set for hearing a complaint that a warehouseman was charging illegal rates under state law. The Commission denied the warehouseman's

claim that the United States Warehouse Act superseded the authority of the Commission to regulate in the manner sought by the complaint. The warehouseman then filed a complaint in the United States District Court seeking an injunction against further state proceedings on the ground that the federal statute pre-empted state regulation. The Court of Appeals sustained this claim, and this Court affirmed. Federal jurisdiction, which was unchallenged, was grounded on 28 U. S. C. §§ 1331 and 1337; federal jurisdiction, of course, could not have existed if foreclosed by the fact that the federal claim could be and was presented as a defense in the state proceedings. *Rice* is but a significant example of a familiar pattern: the person or concern threatened by or involved in state enforcement proceedings repairs to the federal court claiming that the state law and the state proceedings have been pre-empted by congressional enactment. *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151 (1978); *Jones* v. *Rath Packing Co.*, 430 U. S. 519 (1977); *Burbank* v. *Lockheed Air Terminal*, 411 U. S. 624 (1973); *Florida Avocado Growers* v. *Paul*, 373 U. S. 132 (1963); *Hines* v. *Davidowitz*, 312 U. S. 52 (1941). That the complaint in this case, in addition to claiming federal pre-emption, may also have claimed that the state law should not be construed to reach airline maintenance facilities does not defeat federal jurisdiction based on the pre-emption claim.

The suggestion that a defendant in a pending or threatened state action based on state law is foreclosed on jurisdictional grounds from seeking a federal declaratory judgment or an injunction based on the claim that the state action is barred by a federal statute or the Federal Constitution makes little sense in light of the holdings of this Court. Under the *Younger* v. *Harris*, 401 U. S. 37 (1971), line of cases, comity and federalism require a federal court to hold its hand and dismiss rather than interfere with a pending state criminal proceeding, by adjudicating a federal defense that has been or might be raised in that proceeding. Certain civil proceedings are

subject to the same rule. But these holdings do not rest on jurisdictional grounds, and they do not apply when a state proceeding is not pending and in any event do not apply to all civil proceedings. Furthermore, if there is never federal jurisdiction when a state defendant has a dispositive defense grounded in federal law, the Anti-Injunction Act would be surplusage. Under this theory, all such litigants would be required to pursue their federal claims in state court. Perhaps they should, but that is not what the present jurisdictional statutes and our cases construing them require.

The Court of Appeals relied on *Public Service Comm'n of Utah* v. *Wycoff Co.*, 344 U. S. 237, 248 (1952), where the federal plaintiff sought to preclude regulatory action by a State Public Service Commission on the grounds that his shipments were in interstate commerce. This Court held that the action should be dismissed because the federal claim was too abstract, anticipatory, and not ripe for decision. The Court also said:

> "Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." *Ibid.*

But the Court did no more than raise doubts about federal jurisdiction in such a case; indeed, it went on to say:

> "[I]t is not necessary to determine whether, on this record, the alleged controversy over an action that may be begun in state court would be maintainable under the head of federal-question jurisdiction. But we advert to doubts upon that subject to indicate the injury that would be necessary if the case clearly rested merely on threatened suit in state court, as, for all we can learn, it may." *Id.*, at 248–249.

In my view, the holding below is wrong. In any event, it is an extraordinarily important jurisdictional holding and should be reviewed in this Court. I therefore dissent from the denial of certiorari.

No. 81–112. MICHAEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 252.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE POWELL join, dissenting.

The District Court in this criminal case sustained petitioner's motion to suppress on the ground that the evidence in question was obtained by Drug Enforcement Administration agents with the aid of an electronic tracking device or "beeper" which was installed on the exterior of petitioner's rented van and for which no warrant was obtained.

Without reaching the issue of whether the installation of the device was a search or seizure under the Fourth Amendment, the Court of Appeals, en banc, in a 16-to-8 decision, concluded that the installation was permissible even if it were assumed to constitute a search. 645 F. 2d 252 (1981). It held that reasonable suspicion is adequate to support warrantless installation of a beeper because of the limited expectation of privacy in an automobile, because the intrusion occasioned by the placement of the beeper is minimal, and because the important Government interest in eliminating il-

legal drug manufacture outweighs the slight infringement of any expectation of privacy.

Courts of Appeals are divided on the legality of a warrantless installation of a beeper. The First Circuit has held that no warrant is required for the attachment and monitoring of beepers but that probable cause must exist to justify the intrusion. *United States* v. *Moore*, 562 F. 2d 106 (1977). The court saw no merit in the Government counterargument that a lower standard was justified because the case involved a dangerous drug which the public would not want to go undetected. The Sixth Circuit requires a warrant and probable cause for the installation of a beeper. *United States* v. *Bailey*, 628 F. 2d 938 (1980).*

Despite these conflicts, the Solicitor General opposes the petition, arguing that if petitioner is acquitted following a trial on the merits, his claims will be moot. But this would leave the conflicts among the Circuits unresolved, conflicts that are now ripe for our attention. Where there is an important and clear-cut issue of law which is fundamental to the further conduct of the case and which would otherwise qualify as a basis for certiorari, interlocutory status need not preclude review. See *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945); *Gillespie* v. *United States Steel*

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*When JUSTICE REHNQUIST, acting in his capacity of Circuit Justice, denied a motion for a stay in a case from the Ninth Circuit raising this issue, he observed that "in all probability this Court may eventually feel bound to decide whether Government agencies must have probable cause to install tracking devices on motor vehicles" because "the question is an important and recurring one." Thus JUSTICE REHNQUIST thought that the Court would grant certiorari if "such an action would appear to offer the strong likelihood of deciding an issue on which a square conflict exists." *Mirogan* v. *United States*, 439 U. S. 1338, 1342–1343 (1978). With this case the square conflict has emerged.

Other Circuits have reserved the issue because judicial authorization, consent, or exigent circumstances justified the installation. *E. g.*, *United States* v. *Chavez*, 603 F. 2d 143, 145–146 (CA10 1979); *United States* v. *Brunean*, 594 F. 2d 1190, 1194 (CA8 1979).

Corp., 379 U. S. 148, 153 (1964); *Land* v. *Dollar*, 330 U. S. 731, 734, n. 2 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 685, n. 3 (1949).

This is such a case. The law of the Fifth Circuit is now settled. The announced rule will influence, if not determine, the disposition of this case. More importantly, granting certiorari will enable us to resolve the clear conflicts in the Circuits over the use of beepers. This case presents the very set of facts necessary to decide whether warrantless installation of such devices is permissible and, if so, whether reasonable suspicion is adequate justification. Here DEA agents did not have probable cause to support warrantless installation. The panel opinion stated that "only reasonable suspicion existed—at the time the beeper was installed—to believe that the defendant was connected with the criminal activity of another suspect (for whom probable cause did exist)." 622 F. 2d 744, 745 (1980) (footnote omitted). The en banc court agreed, but found such a level of suspicion to be adequate. 645 F. 2d 252 (1981).

Failure to exercise our jurisdiction at this time will not resolve this recurring issue or enhance the factual record. I would grant the petition.

No. 81–365. EA INDUSTRIES, INC. *v.* AMI INDUSTRIES, INC. C. A. 4th Cir. Motion of petitioner to defer consideration of the petition for certiorari denied. Certiorari denied. Reported below: 644 F. 2d 876.

No. 81–403. TEXAS *v.* GREEN. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 615 S. W. 2d 700.

No. 81–5009. CROUCH ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 648 F. 2d 932.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

This case raises the question of how "plain" objects in "plain view" must be in order to justify a warrantless search.

Specifically, it raises the question whether documents that must be read before their incriminating nature becomes evident are in plain view.

Petitioners are Mary Crouch and her son, Gary. On July 3, 1978, Gary Crouch was released for a 3-day furlough from Goodman Correctional Institute, where he was an inmate. Prior to his release, agents of the Drug Enforcement Administration had received information that indicated that Gary and Mary Crouch might be engaged in the manufacture of methamphetamine.[1] On July 3, agents obtained a warrant authorizing a search of the Crouch residence for "chemicals, laboratory equipment, and other paraphernalia, which are used in the illegal manufacture of methamphetamines in violation of 21 U. S. C. § 841(a)(1)." The warrant was executed on the afternoon of July 6.[2] The officers found chemicals, laboratory equipment, and empty gelatin capsules, but no methamphetamine. During the course of the search, agents discovered, in a drawer of a desk, a bundle of letters in open envelopes addressed to Gary at the state penitentiary from Mary. The agents removed the letters, examined their contents and found that they contained information concerning the manufacture of methamphetamine. Subsequently, the agents found another batch of letters, from Gary to Mary, in Mary's purse (the purse does not seem to have been in her possession). These letters contained additional incriminating evidence. Both sets of letters were seized as evidence.

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[1] The information was to the effect that petitioners had ordered laboratory equipment and precursor chemicals that could be used to manufacture methamphetamine.

[2] On July 6, prior to execution of the warrant the DEA agents submitted an addendum to the affidavit in support of the search warrant. That addendum contained information concerning the activities of petitioners since July 3. These activities included visits to the public library to consult chemical reference books and the photocopying of some information from those books. The Federal Magistrate does not seem to have taken any additional action in response to the addendum.

Petitioners unsuccessfully moved to suppress the letters at trial. Both were convicted of attempting to manufacture methamphetamine and of conspiring to manufacture and distribute that substance.

Petitioners appealed the failure to suppress the letters to the Court of Appeals for the Fourth Circuit. That court held the seizure of the letters to have been proper under the plain-view doctrine. 648 F. 2d 932 (1981). It found that the agents acted within the scope of the search warrant in removing the letters from the envelopes to search for the chemicals and paraphernalia named in the warrant. The writings were thereby exposed and, the court concluded, they were "clearly and immediately incriminating." By this, however, the court did not mean that it was not necessary to read the letters in order to establish their incriminating nature. Rather, it held that the "brief perusal" of an item does not render its incriminating nature any the less immediately apparent. *Id.*, at 933.

Although the Solicitor General argues in his response to the petition for certiorari that the search/reading of the letters was within the scope of the term "paraphernalia" as used in the warrant, the Court of Appeals did not rely on this reasoning. I find this argument sufficiently strained that I would not accept it without further development in the lower courts.[*] Therefore, the case, as it comes here, presents only

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[*] Petitioners argue that the letters should be suppressed under *Marron* v. *United States*, 275 U. S. 192 (1927), in which the Court held that a warrant authorizing the seizure of "intoxicating liquors and articles for their manufacture" did not authorize the seizure of ledgers and bills found during the search. *Id.*, at 193. The Solicitor General responds that this case is distinguishable from *Marron* on the ground that the term "paraphernalia," as used in the warrant here, was correctly interpreted by the officers to include the formula necessary to synthesize the drug from precursor chemicals. The officers had reason to believe, and had informed the Magistrate, that the petitioners had photocopied chemical information at the library. The warrant, therefore, could reasonably be interpreted to cover documents. Obviously, this argument relies on the relevance of the July 6

the question of whether a warrantless reading of documents is permissible under the plain-view doctrine; this is the basis upon which the Court of Appeals approved of the search.

Regardless of other disputes as to the scope of the plain-view exception to the warrant requirement, see *Coolidge* v. *New Hampshire*, 403 U. S. 443, 510 (1971) (WHITE, J., concurring and dissenting), it is common ground that the doctrine may justify the search and seizure of items only if the incriminating character of the items is immediately apparent:

> "Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Id.*, at 466 (plurality opinion).

Since *Coolidge*, this Court has not had occasion to develop the limits of the concept "immediately apparent." In the absence of authoritative direction from this Court, a number of Courts of Appeals have held that a plain-view seizure of certain documents is permissible even though their incriminating nature is not apparent absent some reading of their contents. *United States* v. *Ochs*, 595 F. 2d 1247 (CA2 1979) (loansharking records contained on loose ledger sheets and index cards); *United States* v. *Pugh*, 566 F. 2d 626 (CA8 1977) (stationery containing drug weight and price quotations, and a calendar book containing a log of drug distributions); *United States* v. *Gargotto*, 476 F. 2d 1009 (CA6 1973) (betting records); *United States* v. *Damitz*, 495 F. 2d 50 (CA9 1974) (notebook used for recording weights of marihuana bricks); *United States* v. *Smith*, 462 F. 2d 456 (CA8 1972)

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addendum to the earlier affidavit. As the case comes here, however, it is not clear what purpose this addendum was designed to serve or whether it can even be relied upon to interpret the scope of a warrant issued—and not subsequently changed—prior to its submission to the Magistrate.

(lease); *United States* v. *Maude*, 156 U. S. App. D. C. 378, 481 F. 2d 1062 (1973) (identification cards). Although in each of these cases the incriminating character of the evidence was a function of the written message on the object, there are obvious differences in the quality of the perusal required to perceive that character. Some writings may be so obviously incriminating on their face that even a casual glance would reveal this character; others may require extensive reading. I do not believe that any of these cases went as far as the lower court here: permitting perusal of personal letters under the plain-view doctrine.

To extend, by means of the plain-view doctrine, a search authorized by a warrant to the reading of personal papers not included within the terms of that warrant raises extraordinarily important questions. One of the historical purposes of the Fourth Amendment was to bar the indiscriminate search/reading of personal papers under the authority of general warrants. *Marcus* v. *Search Warrant*, 367 U. S. 717, 724–729 (1961). To include perusal of letters or documents enclosed in envelopes within the plain-view exception to the warrant requirement may threaten to expand the bounds of legitimate search warrants and legitimate warrantless searches so far as to authorize in effect general searches. Furthermore, petitioners strongly urge the analogy between the facts of this case and those of *Walter* v. *United States*, 447 U. S. 649 (1980). *Walter* held unconstitutional the unauthorized viewing by the police of films properly in their possession. Exposure of the contents of the film, which we held to require previous judicial authorization despite the presence of probable cause, is not very different from exposure of the written contents of the letters here—an exposure not even supported by probable cause. Cf. *Stanley* v. *Georgia*, 394 U. S. 557, 569 (1969) (Stewart, J., joined by BRENNAN and WHITE, JJ., concurring in result).

At the very least, this case raises important questions that should be settled, and I would grant the petition and set the case for plenary consideration.

No. 81–5086. BOOKER *v.* FLORIDA. Sup. Ct. Fla.;
No. 81–5329. FUNCHESS *v.* FLORIDA. Sup. Ct. Fla.; and
No. 81–5372. BARFIELD *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: No. 81–5086, 397 So. 2d 910; No. 81–5329, 399 So. 2d 356.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

OCTOBER 30, 1981

Miscellaneous Order

No. A–337. CANADY ET AL. *v.* LUMBERTON CITY BOARD OF EDUCATION ET AL. Application for an injunction, presented to THE CHIEF JUSTICE, and by him referred to the Court, preventing the Board of Education and the Board of Elections from permitting residents of the three annexed areas involved in this case to vote in the school board election is granted, pending the timely filing and disposition of a jurisdictional statement, or until appellees demonstrate compliance with Section 5 of the Voting Rights Act. THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST dissent.

NOVEMBER 2, 1981

Appeals Dismissed

No. 80–1894. BEN-LEVI *v.* BEN-LEVI. Appeal from Super. Ct. N. J., App. Div., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument.

No. 81–35. VAN HYNING *v.* UNIVERSITY OF ALASKA. Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 621 P. 2d 1354.

No. 81–354. PICKERING *v.* CITY OF BUFFALO, NEW YORK. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 647 F. 2d 162.

No. 81–441. MARSA *v.* WERNIK, MAYOR OF METUCHEN, ET AL. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 86 N. J. 232, 430 A. 2d 888.

No. 81–454. BARSNESS *v.* IDAHO. Appeal from Sup. Ct. Idaho dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 102 Idaho 210, 628 P. 2d 1044.

No. 81–503. STOLBERG *v.* DAVIDSON ET AL. Appeal from Super. Ct. Conn., New Haven County, dismissed for want of jurisdiction.

No. 81–226. TOWN OF HARDENBURGH, NEW YORK, ET AL. *v.* NEW YORK ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 52 N. Y. 2d 536, 421 N. E. 2d 795.

No. 81–462. SPIEGEL, INC. *v.* WHITAKER ET UX. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 95 Wash. 2d 661, 623 P. 2d 1147.

No. 81–537. BEECHWOOD SANITARIUM, AKA BEECHWOOD NURSING HOME *v.* AXELROD, COMMISSIONER OF HEALTH OF NEW YORK, ET AL. Appeal from App. Div., Sup. Ct. N. Y., 4th Jud. Dept., dismissed for want of substantial federal question. Reported below: 79 App. Div. 2d 1084, 435 N. Y. S. 2d 819.

No. 81–5386. ROGERS *v.* JINKS ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 647 F. 2d 172.

No. 81–5400. STANLEY *v.* STANLEY. Appeal from Ct. App. N. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE BLACKMUN would dismiss the appeal for want of a properly presented federal question. Reported below: 51 N. C. App. 172, 275 S. E. 2d 546.

Certiorari Granted—Reversed and Remanded. (See No. 81–249, *ante*, p. 6.)

Certiorari Granted—Vacated and Remanded

No. 81–5383. MAY *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Adams* v. *Texas*, 448 U. S. 38 (1980). Reported below: 618 S. W. 2d 333.

Miscellaneous Orders

No. — - ——. WILLIAMS ET AL. *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF ARLINGTON ET AL. Motion to direct the Clerk to file the petition for writ of certiorari denied. JUSTICE BLACKMUN would deny the motion as out of time.

No. 78–1545. ZIPES ET AL. *v.* TRANS WORLD AIRLINES, INC.; and

No. 80–951. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 450 U. S. 979.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 80–203. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* CURRAN ET AL. C. A. 6th Cir. [Certiorari granted, 451 U. S. 906.] Motion of Rosenthal & Co. for leave to file a brief as *amicus curiae* denied.

No. 80–1464. WATT, SECRETARY OF THE INTERIOR, ET AL. *v.* ENERGY ACTION EDUCATIONAL FOUNDATION ET AL. C. A. D. C. Cir. [Certiorari granted, 450 U. S. 1040.] Motion of respondents for leave to file affidavits from officers of independent oil companies after argument denied.

No. 80–5889. SANTOSKY ET AL. *v.* KRAMER, COMMISSIONER, ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. [Certiorari granted, 450 U. S. 993.] Motion of the Attorney General of New York for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 81–5634. TISON ET AL. *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioners to expedite consideration of the petition for writ of certiorari and to consolidate this case with No. 81–5321, *Enmund* v. *Florida* [certiorari granted, *ante*, p. 939], denied.

No. 81–325. BLANDING ET AL. *v.* DUBOSE ET AL. D. C. S. C. Motion of the Sumter County appellees to strike the brief of the United States is denied with leave of the Sumter County appellees to file a brief in response to the brief of the Solicitor General on or before November 16, 1981.

No. 81–752. CAREY, GOVERNOR OF NEW YORK, ET AL. *v.* BALDRIGE, SECRETARY OF COMMERCE, ET AL. C. A. 2d Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari and to consolidate this case with No. 80–1436, *Baldrige, Secretary of Commerce* v. *Shapiro, Essex County Executive* [certiorari granted, 451 U. S. 936], and with No. 80–1781, *McNichols, Mayor of Denver* v. *Baldrige, Secretary of Commerce* [certiorari granted, 452 U. S. 937], denied.

No. 80–6298. MILLS *v.* HABLUETZEL. Ct. Civ. App. Tex., 13th Sup. Jud. Dist. [Probable jurisdiction noted, 451 U. S. 936.] Motion of appellee to dismiss the appeal as moot denied.

No. 81–5525. IN RE BOOKER. Petition for writ of habeas corpus denied.

No. 80–6934. IN RE REITER; and

No. 81–5438. IN RE KULWIEC. Petitions for writs of mandamus denied.

Probable Jurisdiction Postponed

No. 81–31. CALIFORNIA ET AL. *v.* GRACE BRETHREN CHURCH ET AL.;

No. 81–228. UNITED STATES ET AL. *v.* GRACE BRETHREN CHURCH ET AL.; and

No. 81–455. GRACE BRETHREN CHURCH ET AL. *v.* UNITED STATES ET AL. Appeals from D. C. C. D. Cal. Further consideration of question of jurisdiction postponed to hearing of cases on the merits. Cases consolidated and a total of one hour allotted for oral argument.

Certiorari Granted

No. 80–1002. BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, ET AL. *v.* ROWLEY, BY HER PARENTS, ROWLEY ET UX. C. A. 2d Cir. Certiorari granted. Reported below: 632 F. 2d 945.

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No. 81–225. BLUE SHIELD OF VIRGINIA ET AL. *v.* MCCREADY. C. A. 4th Cir. Certiorari granted. Reported below: 649 F. 2d 228.

No. 81–395. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* SADLOWSKI ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 207 U. S. App. D. C. 189, 645 F. 2d 1114.

No. 81–412. WILSON *v.* SCRIPPS-HOWARD BROADCASTING CO., DBA WMC TV CHANNEL 5. C. A. 6th Cir. Certiorari granted. Reported below: 642 F. 2d 371.

No. 81–460. MIDDLESEX COUNTY ETHICS COMMITTEE *v.* GARDEN STATE BAR ASSN. ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 643 F. 2d 119 and 651 F. 2d 154.

No. 80–2070. SUMITOMO SHOJI AMERICA, INC. *v.* AVIGLIANO ET AL.; and

No. 81–24. AVIGLIANO ET AL. *v.* SUMITOMO SHOJI AMERICA, INC. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. The Solicitor General is invited to file a brief in these cases expressing the views of the United States. Reported below: 638 F. 2d 552.

No. 80–2205. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS *v.* MURRAY. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 634 F. 2d 365.

No. 81–406. MISSISSIPPI UNIVERSITY FOR WOMEN ET AL. *v.* HOGAN. C. A. 5th Cir. Motion of Mississippi University for Women Alumnae Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 646 F. 2d 1116 and 653 F. 2d 222.

No. 81–450. UNITED STATES *v.* VALENZUELA-BERNAL. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 647 F. 2d 72.

No. 81–440. INSURANCE CORPORATION OF IRELAND, LTD., ET AL. *v.* COMPAGNIE DES BAUXITES DE GUINEE. C. A. 3d Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 651 F. 2d 877.

No. 81–5114. TIBBS *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 397 So. 2d 1120.

No. 81–5152. TAYLOR *v.* ALABAMA. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 399 So. 2d 881.

Certiorari Denied. (See also Nos. 80–1894, 81–35, 81–354, 81–441, 81–454, 81–5386, and 81–5400, *supra*.)

No. 80–1947. FIRST NATIONAL BANK OF TULSA ET AL. *v.* LAYON, EXECUTRIX. Sup. Ct. Okla. Certiorari denied. Reported below: 623 P. 2d 591.

No. 80–1961. QUEEN *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 271 Ark. 929, 612 S. W. 2d 95.

No. 80–1997. INTERNATIONAL ASSOCIATION OF FISH & WILDLIFE AGENCIES *v.* DEFENDERS OF WILDLIFE, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 122, 659 F. 2d 168.

No. 80–6703. GOMEZ *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 101 Idaho 802, 623 P. 2d 110.

No. 80–6841. VALENZUELA ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 157 Ga. App. 247, 277 S. E. 2d 56.

No. 80–6933. EVANS *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 81–5. ALLEN ARCHERY, INC. *v.* PRECISION SHOOTING EQUIPMENT CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 646 F. 2d 313.

No. 81–19. LEPPO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1072.

No. 81–44. LOPEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 116 Cal. App. 3d 600, 172 Cal. Rptr. 236.

No. 81–51. ABRAMS *v.* MISSISSIPPI STATE BOARD OF HEALTH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 640 F. 2d 384.

No. 81–137. DONOHUE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 493.

No. 81–157. PLEDGER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 641 F. 2d 287.

No. 81–173. WASHINGTON POST CO. *v.* REBOZO; and
No. 81–422. REBOZO *v.* WASHINGTON POST CO. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 375.

No. 81–188. CENTER FOR LABORATORY MEDICINE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1069.

No. 81–196. GIACALONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1063.

No. 81–206. AKMAKJIAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 12.

No. 81–231. ALYESKA PIPELINE SERVICE CO. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 226 Ct. Cl. 297, 649 F. 2d 831.

No. 81–236. GRINDSTONE BUTTE PROJECT ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 638 F. 2d 100.

No. 81–239. BROAD *v.* ROCKWELL INTERNATIONAL CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 929.

No. 81–253. UNIVERSAL SECURITY INSTRUMENTS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 649 F. 2d 247.

No. 81–265. CARNATION CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 1010.

No. 81–279. BERMAN ENTERPRISES, INC., ET AL. *v.* LOCAL 333, UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSN., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 644 F. 2d 930.

No. 81–287. AIR CANADA *v.* NATIONAL MEDIATION BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1057.

No. 81–302. JONES ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 640 F. 2d 745.

No. 81–309. WASHINGTON DEPARTMENT OF REVENUE *v.* WOFFORD. Ct. App. Wash. Certiorari denied. Reported below: 28 Wash. App. 68, 622 P. 2d 1278.

No. 81–314. SINE ET AL. *v.* MITCHELL TRANSPORT, INC., ET AL.; and

No. 81–475. EASTERN CONFERENCE OF TEAMSTERS *v.* SINE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 997.

No. 81–320. JETER ET AL. *v.* ASSOCIATED RACK CORP. Ct. Civ. App. Tex., 6th Sup. Jud. Dist. Certiorari denied. Reported below: 607 S. W. 2d 272.

No. 81–348. HOLGERSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 638 F. 2d 104.

No. 81–355. RUSSO ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 1116.

No. 81–369. BERRY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 118 Cal. App. 3d 122, 173 Cal. Rptr. 137.

No. 81–377. MYHRVOLD *v.* SULLIVAN, CORRECTIONAL SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 64.

No. 81–380. BERNSTEIN *v.* ALLSTATE INSURANCE CO. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 119 Cal. App. 3d 449, 173 Cal. Rptr. 841.

No. 81–385. ORE SEA TRANSPORT *v.* BURMAH OIL TANKERS, LTD., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 910.

No. 81–386. JOHNSON *v.* SWEETWATER CARPET CORP. Ct. App. Tenn. Certiorari denied.

No. 81–388. ALPHA STANDARD INVESTMENT CO. *v.* COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 118 Cal. App. 3d 185, 173 Cal. Rptr. 328.

No. 81–401. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 642 F. 2d 666.

No. 81–408. NATIONAL FIDELITY LIFE INSURANCE CO. ET AL. *v.* MATTES, EXECUTOR. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1069.

No. 81–409. CANLIS, SHERIFF-CORONER, ET AL. *v.* SAN JOAQUIN SHERIFF'S POSSE COMITATUS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 641 F. 2d 711.

No. 81–410. NEW YORK *v.* PEPPER. Ct. App. N. Y. Certiorari denied. Reported below: 53 N. Y. 2d 213, 423 N. E. 2d 366.

No. 81–413. OHLER *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 208 Neb. 742, 305 N. W. 2d 637.

No. 81–418. BREW ET AL., TRUSTEES *v.* FIRST WALL STREET SETTLEMENT CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 907.

No. 81–426. FOREMOST INTERNATIONAL TOURS, INC. *v.* QANTAS AIRWAYS LTD. C. A. 9th Cir. Certiorari denied. Reported below: 649 F. 2d 867.

No. 81–428. SCHREIBER *v.* LIVA ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 81–429. BUSHELMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–434. MOLINA *v.* POPULAR DEMOCRATIC PARTY ET AL. Sup. Ct. P. R. Certiorari denied. Reported below: —— P. R. R. ——.

No. 81–436. HURLEY *v.* COMMONWEALTH LAND TITLE INSURANCE CO. C. A. 10th Cir. Certiorari denied. Reported below: 647 F. 2d 1055.

No. 81–439. WINZER *v.* KANSAS CITY SOUTHERN RAILWAY CO. Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Certiorari denied.

No. 81–444. MODIN *v.* NEW YORK CENTRAL CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 650 F. 2d 829.

No. 81–445. BROADWAY DELIVERY CORP. ET AL. *v.* UNITED PARCEL SERVICE OF AMERICA, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 651 F. 2d 122.

No. 81–446. MURRAY *v.* SUPREME COURT OF PUERTO RICO. Sup. Ct. P. R. Certiorari denied.

No. 81–449. FALSTAFF BREWING CORP. ET AL. *v.* DEPENDAHL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 653 F. 2d 1208.

No. 81–456. PRINCE *v.* GRIEVANCE COMMITTEE FOR THE SECOND & ELEVENTH JUDICIAL DISTRICTS. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 81 App. Div. 2d 61, 439 N. Y. S. 2d 205.

No. 81–457. ODEN ET AL. *v.* ANDERSON ET AL. C. A. D. C. Cir. Certiorari denied.

No. 81–459. CONSOLIDATED OIL & GAS, INC. *v.* DIETZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 643 F. 2d 1088.

No. 81–461. ALEXANDER *v.* CHRYSLER CORP. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 932.

No. 81–470. DANIELLO *v.* OLIVETI. Super. Ct. N. J., App. Div. Certiorari denied.

No. 81–479. GREAVES *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 50 Ore. App. 615, 625 P. 2d 1390.

No. 81–482. CAHILL ET UX. *v.* CITY OF CHESAPEAKE. Sup. Ct. Va. Certiorari denied.

No. 81–491. ROY *v.* CIVIL SERVICE COMMISSION, CITY OF WYOMING, OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 81–493. MURPHY *v.* LEHMAN, SECRETARY OF THE NAVY. C. A. D. C. Cir. Certiorari denied. Reported below: 211 U. S. App. D. C. 310, 656 F. 2d 899.

No. 81–495. KAELI *v.* MCKENZIE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1068.

No. 81–498. INTERNATIONAL HARVESTER CO. *v.* DEERE & CO. C. A. 7th Cir. Certiorari denied. Reported below: 658 F. 2d 1137.

No. 81–500. WORRELL *v.* B. F. GOODRICH CO. C. A. 6th Cir. Certiorari denied. Reported below: 659 F. 2d 1083.

No. 81–502. BUSH *v.* CUMBERLAND ENGINEERING. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 81–506. SOTO *v.* SOUTHERN PACIFIC TRANSPORTATION CO. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 2d 1147.

No. 81–507. JEWETT *v.* INTERNATIONAL TELEPHONE & TELEGRAPH CORP. C. A. 3d Cir. Certiorari denied. Reported below: 653 F. 2d 89.

No. 81–512. TELETYPE CORP. *v.* TAYLOR ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 648 F. 2d 1129.

No. 81–514. SKAGGS DRUGS CENTERS, INC., ET AL. *v.* BASELINE LIQUORS. Ct. App. Ariz. Certiorari denied. Reported below: 129 Ariz. 215, 630 P. 2d 38.

No. 81–527. LIBERMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 173.

No. 81–528. CELANO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 659 F. 2d 1086.

No. 81–541. MARTIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 81–556. GARCIA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 647 F. 2d 794.

No. 81–564. SUTHERLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 648 F. 2d 1350.

No. 81–566. DIGGS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 649 F. 2d 731.

No. 81–575. RUIZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 648 F. 2d 219.

No. 81–599. HORTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 646 F. 2d 181.

No. 81–610. DIMOLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 912.

No. 81–619. BASCARO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 2d 722.

No. 81–620. SIBERT *v.* MERIT SYSTEMS PROTECTION BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 926.

No. 81–5029. MOORE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 614 S. W. 2d 348.

No. 81–5039. DAYE *v.* NEWKIRK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 489.

No. 81–5089. GALVAN-SERNA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 66.

No. 81–5097. HARDEN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 276 S. C. 249, 277 S. E. 2d 692.

No. 81–5105. GREENE *v.* GRIFFIN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–5117. COADES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1071.

No. 81–5132. BUSSE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 912.

No. 81–5145. DOYLE *v.* GILL ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 657 F. 2d 260.

No. 81–5166. MATTHEW ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 399 So. 2d 583.

No. 81–5178. HU YAU-LEUNG *v.* SOSCIA, UNITED STATES MARSHAL. C. A. 2d Cir. Certiorari denied. Reported below: 649 F. 2d 914.

No. 81–5222. WOJCIECHOWSKI *v.* HOROWITZ. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 861.

No. 81–5228. HUNTER *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 430 A. 2d 476.

No. 81–5278. GURLEY *v.* METZ, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1059.

No. 81–5313. BOGGINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 81–5340. WOODS *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 912.

No. 81–5349. STEINSVIK *v.* MORRIS. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 172.

No. 81–5350. RELIFORD *v.* RICKETTS ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–5353. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5354. VENERI *v.* DELAWARE COUNTY COMMON PLEAS COURT ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–5355. KINNELL *v.* THEIS, U. S. DISTRICT JUDGE, ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–5357. HAYMON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 616 S. W. 2d 805.

No. 81–5363. DORSEY *v.* CURTIN & JOHNSON, INC., ET AL. Sup. Ct. Va. Certiorari denied.

No. 81–5364. GARCIA *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1071.

No. 81–5365. PREBLE *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 430 A. 2d 553.

No. 81–5366. EVANS *v.* DELAWARE; and YOUNG *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 430 A. 2d 481 (first case); 431 A. 2d 1252 (second case).

No. 81–5369. POWELL *v.* OFFSHORE NAVIGATION, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 2d 1063.

No. 81–5370. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5374. HIGGINS *v.* CHARACTER AND FITNESS COMMITTEE, FOURTH DEPARTMENT, NEW YORK SUPREME COURT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 81–5378. LONG *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 923.

No. 81–5380. CHARLES *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 612 S. W. 2d 778.

No. 81–5381. WHITE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 616 S. W. 2d 230.

No. 81–5382. SANDERS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 303 N. C. 608, 281 S. E. 2d 7.

No. 81–5384. ROBERTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 650 F. 2d 933.

No. 81–5387. PAOLO *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 51 Ore. App. 365, 625 P. 2d 1391.

No. 81–5389. UNITED STATES EX REL. LEWIS *v.* CIRCUIT COURT FOR MILWAUKEE COUNTY ET AL. Ct. App. Wis. Certiorari denied.

No. 81–5391. MARTINEZ *v.* DEAUVILLE HOTEL ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 399 So. 2d 1144.

No. 81–5392. RIVERA *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 81–5399. RUBASKY *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 401 So. 2d 894.

No. 81–5401. SABEL *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 248 Ga. 10, 282 S. E. 2d 61.

No. 81–5404. BOLDT *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 101 Wis. 2d 566, 305 N. W. 2d 133.

No. 81–5405. BOLES *v.* JOHNSON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 932.

No. 81–5413. ZUREK *v.* HASTEN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 657 F. 2d 272.

No. 81–5431. IN RE CAMPBELL. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 1076.

No. 81–5434. ALLARD *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 649 F. 2d 862.

No. 81–5449. OLIVER *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–5474. PAUL *v.* STAFFORD, U. S. DISTRICT JUDGE, NORTHERN DISTRICT OF FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 81–5475. PRESLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 81–5487. ORTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 942.

No. 81–5502. MCCONNELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–5503. GRAY *v.* BORDENKIRCHER, WARDEN, WEST VIRGINIA PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 1040.

No. 81–5505. PHILLIPPI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 655 F. 2d 792.

No. 81–5510. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 671 F. 2d 496.

No. 81–5511. BIERMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–5512. LEWIS *v.* PETROVSKY, WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 81–5513. SWAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 661 F. 2d 936.

No. 81–5514. BIONDICH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 652 F. 2d 743.

No. 81–5522. MOORE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 1075.

No. 81–5529. HESTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 928.

No. 81–5538. BURNS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 80–1829. AUSTIN, STATE ATTORNEY, FOURTH JUDICIAL CIRCUIT OF FLORIDA, ET AL. *v.* ROBERTS ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Motion of Florida for leave to file a brief as *amicus curiae* out of time denied. Certiorari denied. Reported below: 632 F. 2d 1202.

No. 80–1876. MICHIGAN *v.* PLANTEFABER. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 410 Mich. 594, 302 N. W. 2d 557.

No. 80–1910. VASQUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 638 F. 2d 507.

Opinion of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

Practical considerations preclude the Court from explaining its reasons for denying petitions for certiorari. See *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912 (opinion of Frankfurter, J., respecting the denial of the petition for writ of certiorari). Opinions dissenting from the denial of certiorari are answered so rarely that they may some-

times create an unwarranted impression that the Court is not administering its certiorari docket in a responsible way.[1] Because I was concerned that JUSTICE REHNQUIST's opinion in *Davis* v. *Jacobs*, *ante*, p. 915, might create such an impression, I thought it appropriate to write in response. A similar concern prompts me to write in this case.

JUSTICE BRENNAN's dissenting opinion correctly points out that there are substantial arguments favoring a grant of certiorari. There are, however, at least three countervailing considerations militating in favor of a denial of certiorari that do not clearly emerge from a reading of the dissenting opinion.

First, there is no allegation in the petition for certiorari that there is a conflict between the decision of the Court of Appeals in this case and any other Federal Court of Appeals decision. Often the law develops in a more satisfactory fashion if this Court withholds review of novel issues until differing views have been expressed by other federal courts.[2]

Second, it is not clear that petitioner has standing to object to the seizure of evidence in this case. At issue is the legal-

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[1] "One characteristic of all opinions dissenting from the denial of certiorari is manifest. They are totally unnecessary. They are examples of the purest form of dicta, since they have even less legal significance than the orders of the entire Court which, as Mr. Justice Frankfurter reiterated again and again, have no precedential significance at all.

"Another attribute of these opinions is that they are potentially misleading. Since the Court provides no explanation of the reasons for denying certiorari, the dissenter's arguments in favor of a grant are not answered and therefore typically appear to be more persuasive than most other opinions. Moreover, since they often omit any reference to valid reasons for denying certiorari, they tend to imply that the Court has been unfaithful to its responsibilities or has implicitly reached a decision on the merits when, in fact, there is no basis for such an inference." *Singleton* v. *Commissioner*, 439 U. S. 940, 944–945 (opinion of STEVENS, J., respecting the denial of the petition for writ of certiorari).

[2] "Wise adjudication has its own time for ripening." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 918.

ity of a warrantless search of the fourth floor apartment at 633 Grand Street in Brooklyn, N. Y. The landlord at 633 Grand testified both at the suppression hearing and at trial that a man named Jorge Osorio, and not petitioner, had rented and lived in the fourth-floor apartment. Petitioner himself introduced into evidence two utility bills addressed to Jorge Osorio at 633 Grand Street. Moreover, petitioner challenged on appeal the sufficiency of the evidence against him on the grounds that it had not been shown that he was the renter of the apartment, or that he was a knowing participant in a conspiracy.[3]

Third, Judge Kearse's thorough opinion for the Court of Appeals, which occupies 55 printed pages of the appendix to the certiorari petition, demonstrates that the decision of the court was based on the totality of the specific factual circumstances of this case.[4] It is often appropriate to decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases. Unfortunately, to assess fairly the import of the decision of the Court of Appeals, one must review at some length the detailed facts underlying that decision.

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[3] The Court of Appeals' opinion does refer to evidence suggesting that petitioner had rented the fourth-floor apartment, but does not expressly resolve the issue. It is sound practice, however, to deny a petition for certiorari when the facts do not firmly establish that the petitioner has standing to raise the question presented. Cf. *Mental Hygiene Dept. of Cal.* v. *Kirchner*, 380 U. S. 194, 200.

[4] JUSTICE BRENNAN suggests, in his dissenting opinion, that the Court of Appeals has enunciated a broad exception to the warrant requirement that "not only authorizes the police to enter a home without a warrant in circumstances far less compelling than we have recognized, but permits law officers, in determining the time and manner of executing an arrest, to contrive their own exigency and thereby avoid the necessity of procuring a warrant before entering the home." *Post*, at 983. In my judgment, this is not a fair characterization of the cautious and circumscribed opinion written by Judge Kearse.

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The search at issue arose out of a police surveillance at 633 Grand Street on the evening of November 29, 1979. During the early hours of the evening, police officers arrested three sets of individuals as a result of that surveillance, each of which was in possession of a large quantity of cocaine. Amparo Medina left the building at 633 Grand carrying a large handbag, eluded the police, and returned home; police later arrested Medina and her husband Fernando after Fernando left the Medina home and officers found one pound of cocaine in his car. Clara and Hernando Mesa next exited 633 Grand; police arrested the Mesas after finding one-half pound of cocaine in their car. Within a short period of time, Carlos Sanchez left 633 Grand with a shopping bag; police arrested Sanchez after finding a pound of cocaine in the bag. The police made each of these arrests outside of the view of individuals remaining at 633 Grand.

After arresting Sanchez, the police observed three men, later identified as Jaramillo, Parra, and Uribe, leave 633 Grand. The officers stopped the three men, and led them around the corner and out of sight of anyone remaining inside. Although it was a cold night, Jaramillo had come outside wearing only a shirt, pants, and slippers with no socks; Jaramillo also did not carry any keys. The officers asked Jaramillo and Parra what apartment they had been in. The men replied that they had been visiting a woman in the second-floor apartment, and Jaramillo agreed to accompany the officers to that apartment. While Jaramillo and the officers were en route to the apartment, petitioner and Essau Correa exited 633 Grand and were detained by the police.

Jaramillo led the officers to the second-floor apartment, and Dora Wright, the landlord of the building, opened the door. Several officers, with guns drawn, immediately entered and fanned out through the apartment, checking each room for other persons. Jaramillo asked Wright in Spanish to tell the police that he had been with her earlier, but she

replied that this was not so. Instead, Wright stated that throughout the day Jaramillo and others had been in and out of the fourth-floor apartment. As the officers spread through the apartment to assure themselves that it was not the scene of the narcotics operation, Dora Wright, her mother, and her baby all began to scream. By all accounts, the scene was tumultuous, and the three were still screaming 10-15 minutes later.

At this point, the officers decided to enter the fourth-floor apartment. The officers testified that they feared that additional persons might be in the apartment who might be aware of the activities of the police and would destroy evidence. To avoid a planned forced entry, Wright gave the officers a key.

On entering each room of the fourth-floor apartment, the officers seized a series of items. From an open foyer closet, the officers seized white powdery substances wrapped in clear plastic bags, some of which were inside an open plastic garbage bag and others of which were in an open traveling bag. In the center bedroom they seized a number of documents from an open box. In the rear bedroom they found, exposed to open view, a pound of cocaine, a triple-beam scale, and a large piece of glass covered with cocaine residue. They also found, in an open box lying in a metal cabinet, 16 bottles of Mannitol, 2 strainers, assorted boxes of plastic bags, a set of weights, and a scale. An officer also seized a pistol that he found as he "absentmindedly reached between the mattress and the box spring" of a bed on which he was sitting.

The initial check of the apartment was completed in a few minutes. The officers remained, however, for an additional 16 hours.

In response to petitioner's motion to suppress evidence seized from the apartment, the District Court ruled that only those items observed in plain view during the initial cursory inspection of the apartment were admissible. The court sup-

pressed the items seized from the box inside the metal cabinet, the documents seized after the initial entry, and the gun found under the mattress. On appeal, the Court of Appeals upheld the admission into evidence of items seized during the initial cursory inspection of the premises.

In light of the suppression of certain evidence by the District Court, the only issue that is now presented is whether the police were entitled to enter the fourth-floor apartment without a warrant to make a cursory inspection of the premises. In considering the resolution of this issue by the Court of Appeals, it is illuminating to state in full the discussion and limited holding of the court:

> "The circumstances at 633 Grand Street present a very close question. Siegel testified that the agents were concerned that people remaining in the apartment might destroy evidence there, and there was some basis for this. Jaramillo and Parra had tried to divert the officers' attention from the fourth floor by telling them they had come from the second floor; and Wright revealed that Jaramillo's conversation with her in Spanish, when the agents went to her second-floor apartment, asked her to confirm this misdirection. Such attempts at diversion suggested that the fourth floor apartment contained evidence, or other persons, or both. It is true that one officer who placed his ear to the door of that apartment heard no sounds from inside, but there was another basis for believing that one or more persons remained in the apartment. It was a cold night, and Jaramillo had come outside wearing only a shirt, pants, and slippers with no socks. He had no key with him, and it could be inferred that there was someone in whatever apartment he had come from—the fourth floor apartment according to Wright—to let him back in. It was therefore reasonable to infer that evidence could well be destroyed if the persons remaining there were alerted to the agents' activities.

"By the time the agents determined that Jaramillo's designation of the second floor was a red herring, there was ample cause to believe that any remaining occupant of the fourth floor would have been alerted. For most of the evening the agents had managed to effect their arrests and investigatory stops out of the line of sight of the apartment. The last stops, however, had been made in front of the building. Then, when Jaramillo's claim that he had been on the second floor was being investigated, there was an extended commotion resulting from the involvement of the apparently unsuspecting Mrs. Wright and the entry of several agents into her apartment in the expectation, based on Jaramillo's statement, that they were at the scene of the cocaine operation.

"We do not accept [petitioner's] contention that a security check was improper because the duration of the commotion would have allowed the destruction of any evidence to be completed before the officers entered. We do not think the exigency abated because the second-floor tumult lasted 10-15 minutes. What is troublesome, however, is the fact that the agents went far beyond the bounds of the permissible security check. Although it took but a few minutes to determine that there were no other people in the apartment, *they remained there for sixteen hours*. They seized not only items that were in plain view, but also, obviously, items that were completely hidden from view. The district judge suppressed thirteen items that he determined were 'the products of a thorough search of the premises.' Had the district court inferred from these facts that the agents' intention in entering the apartment was not to conduct a security check, we would be hard-pressed to hold such a finding clearly erroneous.

"In fact, however, the district court implicitly found that the officers entered with the intention to make a se-

curity check, and explicitly found that there were reasonable bases for their belief that additional evidence was present in the apartment and that there might be someone there who could destroy it. Since these explicit findings, which are not clearly erroneous, justified a security search, the items in plain view during the course of that search were properly seized." 638 F. 2d 507, 531–532. (Emphasis in original.)

The Court of Appeals noted that a "very close question" was presented in this case. After carefully appraising the facts, the court concluded that the police were justified in executing a warrantless entry to make a cursory inspection of the premises to guarantee that evidence was not being destroyed.[5] In declining to grant certiorari to review that ap-

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[5] Such a conclusion does not lack support in decisions of this Court. In *Schmerber* v. *California*, 384 U. S. 757, the Court held that the administration of a blood test to check for the presence of alcohol, without the authority of a search warrant, did not violate the Fourth Amendment. In his opinion for the Court, JUSTICE BRENNAN wrote:

"Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that the inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson* v. *United States*, 333 U. S. 10, 13–14; see also *Aguilar* v. *Texas*, 378 U. S. 108, 110–111. The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

"The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay neces-

praisal of the facts, this Court does not in any way suggest that an individual's home is not entitled to rigorous Fourth Amendment protection. Indeed, recent decisions of this Court, see, *e. g.*, *Payton* v. *New York*, 445 U. S. 573; *Steagald* v. *United States*, 451 U. S. 204, as well as decisions of the Courts of Appeals, see, *e. g.*, *United States* v. *Rosselli*, 506 F. 2d 627, 630 (CA7 1974); *United States* v. *Rubin*, 474 F. 2d 262, 268 (CA3 1973), prove just the opposite.

In my opinion, this Court has not abused its discretion in allowing the judgment of the Court of Appeals to stand.

JUSTICE BRENNAN, with whom JUSTICE WHITE and JUSTICE MARSHALL join, dissenting.

Unless supported by a warrant issued upon probable cause, entry into a home to conduct a search is *per se* unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357 (1967). In this case the Court of Appeals purported to identify and apply a "security check" exception to the warrant requirement which, as I understand the opinion below, would allow warrantless entry into a home following an arrest outside, if the arresting officers possess a reasonable belief that third persons are inside and aware of the arrest, "so that they might destroy evidence." 638 F. 2d 507, 531. The exception thus stated not only authorizes the police to enter a home without a warrant in circumstances far less compelling than we have recognized, but permits law officers, in determining the time and manner of executing an arrest, to contrive their own exigency and thereby avoid the necessity of procuring a warrant before entering the home. This case illustrates the potential danger of this exception to

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sary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,' *Preston* v. *United States*, 376 U. S. 364, 367." *Id.*, at 770.

Fourth Amendment protection, and surely the Court ought not let the decision stand without plenary review.[1]

I

The search at issue arose out of the investigation of a cocaine distribution ring by the New York Drug Enforcement Task Force. Officers of the Task Force followed a suspected member of the ring to a building in Brooklyn; a store occupied the first floor of the building, while the three floors above each contained one apartment. The officers took up surveillance outside the building. Lights were visible only on the fourth floor. In the course of the evening, the officers twice stopped persons leaving the building, discovered cocaine in their possession, and made arrests. Some time later they

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[1] As JUSTICE STEVENS notes, *ante*, at 977, Judge Kearse's opinion for the Court of Appeals describes in considerable detail the factual background pertinent to petitioner's claim here. In addition, the opinion clearly states the legal standard believed applicable, and applies that standard in appraising the police conduct in question and the ruling of the District Court. But this in my view makes this case a particularly good vehicle for the exercise of our certiorari jurisdiction: the facts developed by the Court of Appeals suggest that a more restrictive standard respecting the circumstances under which warrantless entry of a home is constitutionally permitted would have produced a contrary ruling on petitioner's motion to suppress; and the factual analysis of the Court of Appeals would be most helpful to this Court in defining a standard meaningful to police officers in the execution of their responsibilities, and capable of consistent application in the courts.

While there is some evidence suggesting that petitioner had no protectible interest in the fourth-floor apartment, I do not share JUSTICE STEVENS' concern whether petitioner had standing to contest this search. It is apparent to me that any possible question which was or could have been raised in that regard was resolved by the Court of Appeals in favor of petitioner. But whether that question, or other considerations identified by JUSTICE STEVENS, or any number of other factors not suggested by him, persuaded my colleagues against the exercise of our certiorari jurisdiction here, quite obviously my own view is that this is a very appropriate case for plenary review.

observed three men leaving the building, stopped them, brought them around the corner, and held them in custody. The officers asked what apartment they had been in. One of the detainees replied that they had been visiting a woman in the second-floor apartment, but would not give her name. Upon request, however, he agreed to accompany the officers to that apartment. As they approached the entrance, the officers saw petitioner exiting the building, recognized him as a known cocaine dealer, and placed him in custody with the others.

With the assistance of their detainee, the police persuaded the occupants of the second-floor apartment to open the door. The court below described the ensuing scene as "tumultuous," as the officers, guns drawn, immediately entered and fanned out to search the apartment for cocaine amidst the screams of the landlady, her mother, and her baby. Ultimately recognizing that they had entered and searched the wrong apartment, the officers announced their intention to climb to the fourth-floor apartment and enter through the window from the fire escape, prompting the landlady to produce a key.

The officers found no one in the fourth-floor apartment, but they did discover several items of drug paraphernalia, as well as one pound of cocaine said to be in plain view in an open foyer closet. These items were admitted into evidence in the course of petitioner's trial for conspiracy to distribute cocaine and possession of cocaine with intent to distribute. The District Court did suppress, however, a number of additional items discovered by the officers in the course of their 16-hour warrantless habitation of the premises, concluding that these items had been discovered in the course of a search which exceeded the permissible bounds of a security check.

The Court of Appeals affirmed, holding that the officers' entry and cursory search of the apartment fulfilled the requirements of the security check exception as applied in that

Circuit. The court found support for the officers' belief that the fourth-floor apartment contained suspects and evidence in the fact that the police had initially been diverted away from that apartment by their detainees. Additional support for the presence of persons in the apartment was found in the fact that one of the detainees had come to the street, despite the coolness of the evening, wearing only a shirt, pants, and slippers, and without a key in his possession. The reasonable belief that if other persons were in the apartment, they knew of the arrest, rested on the location of the arrest and the commotion which resulted from the search of the second-floor apartment.

II

The Court of Appeals sought support for its recognition of an exception to the warrant requirement for a "'security check' or 'protective sweep' incident to a lawful arrest" in *Chimel* v. *California*, 395 U. S. 752 (1969). 638 F. 2d, at 530. In *Chimel* we held that police may not routinely search a residence as an incident to a lawful arrest on the premises. In order to ensure the safety of the arresting officer and to prevent the destruction of evidence, however, we recognized that police may, as an incident to the arrest, lawfully search the area within an arrestee's immediate control. Building on this rationale, several courts have allowed officers engaged in an arrest in a dwelling, to conduct a "quick sweep" for other persons on the premises who might pose a danger to the police.[2] But as the Court of Appeals itself recognized in this

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[2] See *United States* v. *Gardner*, 627 F. 2d 906 (CA9 1980); *United States* v. *Spanier*, 597 F. 2d 139 (CA9 1977); *United States* v. *Cravero*, 545 F. 2d 406 (CA5 1976), cert. denied *sub nom. Miller* v. *United States*, 429 U. S. 1100 (1977); *United States* v. *Cepulonis*, 530 F. 2d 238 (CA1), cert. denied, 426 U. S. 908 (1976); *United States* v. *Rich*, 518 F. 2d 980 (CA8 1975), cert. denied, 427 U. S. 907 (1976); *United States* v. *Looney*, 481 F. 2d 31 (CA5), cert. denied, 414 U. S. 1070 (1973); *United States* v. *Cristophe*, 470 F. 2d 865 (CA2 1972), cert. denied *sub nom. Panica* v. *United States*, 411 U. S. 964 (1973). See also *Chimel* v. *California*, 395 U. S., at 775 (WHITE, J.,

case, whatever the merit of such a sweep where the police are otherwise lawfully on the premises, "[d]ifferent considerations come into play . . . when a defendant is arrested outside his residence and the government seeks to justify an entry into the home for a security check." 638 F. 2d, at 531. Nevertheless, noting that other courts have permitted a sweep into the home in search of persons following an arrest outside,[3] the Court of Appeals sustained the validity of the warrantless entry and initial search here based on nothing more than the officers' "reasonable belief" that there were additional persons in the apartment who were aware of petitioner's arrest.

Despite the currency of the doctrine in the lower courts, no decision of this Court supports the existence of a general "security check" exception to the warrant requirement. Quite to the contrary, even before *Chimel* we held that "a search 'can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest.'" *Shipley* v. *California*, 395 U. S. 818, 819 (1969) *(per curiam)*, quoting *Stoner* v. *California*, 376 U. S. 483, 486 (1964). As we noted in *Shipley*, "the Constitution has never been construed by this Court to allow the police, in the absence of an emergency, to arrest a person

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dissenting) (possible removal of evidence should justify search following arrest in residence). But see *United States* v. *Gamble*, 473 F. 2d 1274 (CA7 1973).

[3] Several of the cases have allowed a security search where police possessed a reasonable apprehension of violence from within the house as they executed an arrest outside. See *United States* v. *Baker*, 577 F. 2d 1147 (CA4), cert. denied *sub nom. Weinstein* v. *United States*, 439 U. S. 850 (1978); *United States* v. *Bowdach*, 561 F. 2d 1160 (CA5 1977); *Hopkins* v. *Alabama*, 524 F. 2d 473 (CA5 1975). At least two federal cases other than this one have ratified warrantless security searches premised solely on an asserted desire to preserve evidence. See *United States* v. *Fulton*, 549 F. 2d 1325 (CA9 1977); *United States* v. *McLaughlin*, 525 F. 2d 517 (CA9 1975), cert. denied, 427 U. S. 904 (1976). See also *Thomas* v. *Parett*, 524 F. 2d 779 (CA8 1975); *United States* v. *Rubin*, 474 F. 2d 262 (CA3), cert. denied *sub nom. Agran* v. *United States*, 414 U. S. 833 (1973).

outside his home and then take him inside for the purpose of conducting a warrantless search." 395 U. S., at 820. Indeed, our precedents can more reasonably be read as interpreting the Fourth Amendment to bar the warrantless entry of a residence predicated solely on the belief that persons on the premises, knowing of the arrest, might destroy evidence. See *Vale* v. *Louisiana*, 399 U. S. 30 (1970).

We have, of course, recognized that a warrantless entry is permissible in an exigent circumstance. See *Mincey* v. *Arizona*, 437 U. S. 385, 393 (1978). But even assuming that the need to preserve evidence could provide a basis for a finding of exigent circumstances sufficient to allow the police to enter a home without a warrant, cf. *Schmerber* v. *California*, 384 U. S. 757, 770 (1966), the Constitution surely requires a far more substantial showing of exigency than was made here: Not only must there have been probable cause to search, but there must also have been a "reasonable belief," based on articulable facts, that the destruction of evidence was imminent; and further, there must be the assurance that the emergency giving rise to the warrantless entry could not responsibly have been avoided. See *United States* v. *Rosselli*, 506 F. 2d 627 (CA7 1974). Because from all appearances the warrantless entry in this case can be justified neither as a search incident to an arrest nor as compelled by exigent circumstances, and because the court below enunciated a broad exception to the warrant requirement not recognized by any decision of this Court, and which can all too easily become "enthroned into the rule," *United States* v. *Rabinowitz*, 339 U. S. 56, 80 (1950) (Frankfurter, J. dissenting), I would grant certiorari and set this case for argument.

No. 80–2017. SNEAD, SHERIFF, ET AL. *v.* STRINGER. C. A. 5th Cir. Certiorari denied. Reported below: 640 F. 2d 383.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

This case offers an instructive example of a phenomenon not uncommon in constitutional law. The Constitution is a

written document, but cases and controversies involving its provisions necessarily result in opinions from this Court. Those opinions themselves contain aphorisms, whose resemblance to the actual text of the Constitution grows increasingly remote as they are used as substitutes for the text itself, applied to wholly different situations than that addressed in the original case, or simply used as convenient "catchwords" to justify a given result. In my opinion, that is what has happened here. Constitutional building blocks have been piled on top of one another so that the connection between the original provision in the Constitution and the application in a particular case is all but incomprehensible.

Massiah v. *United States*, 377 U. S. 201, 206 (1964), reversed the conviction of an accused on the ground that he had been denied "the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him." One building block was used to reach *that* result. *Powell* v. *Alabama*, 287 U. S. 45 (1932), held that a trial court's failure to appoint counsel in a capital case until the trial began violated the Due Process Clause of the Fourteenth Amendment because it deprived the defendants of an opportunity to consult with an attorney, and have him investigate their case and prepare a defense. In *Massiah*, the Court implicitly concluded that the Sixth Amendment's guarantee of the assistance of counsel includes a promise of the *companionship* of counsel, at least when an interrogation takes place following the initiation of criminal proceedings.[1] But *Massiah* was further expanded in *Brewer* v. *Williams*, 430 U. S. 387 (1977), at least insofar as the latter case appeared to establish an extremely heavy burden which the prosecution must carry to demonstrate waiver

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[1] The holding of *Massiah* was immediately rendered authoritative in the States by virtue of another judicial building block—the "selective incorporation" of the Sixth Amendment by the Due Process Clause of the Fourteenth accomplished in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).

of the right to counsel, despite the existence of a voluntary admission by one who has been informed of and understands his rights. Nevertheless, *Brewer* emphasized that an accused has a right to the presence of counsel only when the government interrogates him. *Id.*, at 400, 401. In *Brewer*, detectives "deliberately and designedly set out to elicit information from" the defendant. *Id.*, at 399. In the present case, the lower federal courts held in a habeas corpus proceeding that the *Massiah* rule was violated when the State introduced against respondent evidence of incriminating statements which he *volunteered* to the prosecutor in a brief telephone conversation. Thus, another building block is added to support a result even further from the text of the Constitution from which it purports to derive.

Respondent was indicted by an Alabama grand jury on one count of forgery and one count of embezzlement. He was Mayor of Hobson City, which issued a check to one Malone, at one time the city's Fire Chief. The check was signed by respondent and the City Clerk and was endorsed in the name of the respondent and of Malone. But Malone testified that at the time the check was issued, he was no longer in the city's employ. He also testified that he neither endorsed his name on the check nor authorized respondent to do so, and that he never received proceeds from the check. Other evidence indicated that respondent had deposited the check in his own account.

Respondent testified in his own behalf to the effect that Malone had asked if his brother could fulfill his duties during the period of an absence from the State necessitated by personal problems. Malone also allegedly gave respondent permission to endorse paychecks and deliver the proceeds to his brother. Thus, as the record comes to us, with a jury finding of guilty, an affirmance by the Alabama Court of Criminal Appeals, and a denial of certiorari by the Supreme Court of Alabama, it provides a jury question of guilt or innocence so

far as the charges were concerned. But respondent eventually sought federal habeas relief in the United States District Court for the Northern District of Alabama. His complaint there was that the state prosecutor had violated *Massiah*, *supra*, *Brewer*, *supra*, and the more recent case of *United States* v. *Henry*, 447 U. S. 264 (1980). These violations were alleged to consist of the testimony of the District Attorney at trial about a telephone conversation with respondent. He was examined by an Assistant District Attorney; over respondent's objection, he testified that he had called to request city records for use as samples of respondent's handwriting and that of the Malone brothers. At this time respondent was under indictment and had retained counsel, but still served as Mayor and custodian of the city's records. In reply to the District Attorney's request, respondent stated that the records would be made available, but that they would be unnecessary since he had signed Malone's name, as well as his own, on the back of the check.[2]

Ultimately, the jury acquitted respondent of forgery, but convicted him of embezzlement. Respondent appealed to the Alabama Court of Criminal Appeals. He argued, in part, that the District Attorney's telephone request for handwriting exemplars should have been preceded by the warnings required in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The Court of Criminal Appeals rejected this argu-

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[2] According to petitioners, the District Attorney's relevant testimony is as follows:

"I asked Mayor Stringer if he would be willing to, through records down there at City Hall, provide me with samples of his handwriting and Donald Malone's handwriting and William Malone's handwriting. . . .

. . . . . .

"Q. What was Mayor Stringer's reply to you, please?

"A. He was willing to give me those records. He said that I was welcome to have whatever records that I wanted but he said he felt like it was unnecessary because he had signed William Malone's name to the back of the check as well as his own. . . ." Pet. for Cert. 10–11.

ment, concluding that the telephone call did not amount to custodial interrogation. *Stringer* v. *State*, 372 So. 2d 378, 382 (1979). It noted that "the admission was a volunteered statement, not in response to a question calling for such an answer." *Ibid.* The court also dismissed the contention that the conviction was invalid because the District Attorney had violated an ethical obligation imposed by the Alabama Code of Professional Responsibility to contact respondent's attorney before initiating the telephone call. Assuming that a breach of ethical obligations had occurred, it could provide no basis for reversing a criminal conviction. *Id.*, at 382–383. Finally, the court concluded that any error in admission of the District Attorney's testimony was harmless. "[T]he appellant testified at trial that he signed William Malone's name to the check. In fact his whole defense was that he had Malone's permission to sign the check." *Id.*, at 383. The court affirmed respondent's conviction, and the Alabama Supreme Court denied a writ of certiorari. *Ex parte Stringer*, 372 So. 2d 384 (1979).

Respondent then sought a writ of habeas corpus in the United States District Court for the Northern District of Alabama. In a brief opinion, that court issued the writ on the ground that

> "the securing of an incriminating statement from a defendant who was represented by counsel after indictment in the absence of presence of defense counsel or a waiver thereof is a deprivation of such a defendant's right to counsel as that right is described in *Massiah* v. *United States*, [377 U. S. 201 (1964)]. Due to the fact that without the evidence obtained by the prosecuting official the State's case would have likely failed, it is impossible to conclude that the obtaining of this statement was harmless error." App. to Pet. for Cert. 6a–7a.

The United States Court of Appeals for the Fifth Circuit affirmed for the reasons set forth in the District Court's opinion. 640 F. 2d 383 (1981).

By a subtle process, the relevant text of the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence," has in a short period of time evolved through a stage of excluding testimony "deliberately elicited" from a defendant who had been isolated from the services of counsel, to mandating a new trial of one who by telephone has volunteered a statement to a prosecutor.

As one Member of the *Henry* majority stated, "*Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action." 447 U. S., at 276 (POWELL, J., concurring). Rather, "a defendant must show that the government engaged in conduct that, considering all of the circumstances, is the functional equivalent of interrogation." *Id.*, at 277. The facts and language of *Massiah*, *Brewer*, and *Henry* clearly support that interpretation. They offer no support for the result in this case.

The federal habeas court also concluded that the admission of respondent's statement could not have been harmless error. App. to Pet. for Cert. 7a. This conclusion was squarely contrary to that of the Alabama Court of Criminal Appeals, which found that any error in the admission of the District Attorney's testimony was harmless. As noted, "the appellant testified at trial that he signed William Malone's name to the check. *In fact his whole defense was that he had Malone's permission to sign the check.*" 372 So. 2d, at 383 (emphasis supplied). It is even less likely that the testimony influenced the verdict in view of the jury's acquittal of respondent on the forgery charge.

It is scarcely surprising that fewer and fewer capable lawyers can be found to serve on state benches when they may find their considered decisions overturned by the ruling of a

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single federal district judge on grounds as tenuous as these. This case represents, not merely one more piece of grist in a giant judicial mill, but a vivid illustration of the misapplication of the precedent of this Court by a single federal habeas court,[3] followed by a conclusion that the habeas court's version of our case law required exclusion of evidence which the state court system had found to be harmless. I would therefore grant the petition for certiorari in this case.

No. 80–2021. UNITED CREDIT BUREAU OF AMERICA, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 643 F. 2d 1017.

JUSTICE REHNQUIST, dissenting.

In this case, the National Labor Relations Board (NLRB) found that petitioner had committed an unfair labor practice by filing a civil action for damages in state court against a discharged employee who had filed unfair labor practices charges with the NLRB. The NLRB ordered petitioner to dismiss the state-court action and reimburse the employee for all legal expenses she had incurred in defending the lawsuit. Because I believe that principles of federalism and comity should preclude the NLRB from interpreting the Na-

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[3]The District Judge in this case also rendered the initial decision ultimately reversed in *Beatty* v. *United States*, 389 U. S. 45 (1967). *Beatty* was a one-sentence *per curiam* opinion, resting on the authority of *Massiah*. In his opinion in this case, the judge recalled that experience in offering consolation to the District Attorney: "Prosecuting officials and trial judges acting with absolute good faith and sincerity oftentimes take acts which run afoul of principles of law declared by the Supreme Court of the United States. This court found itself in the same position in *Beatty* v. *United States* . . . ." App. to Pet. for Cert. 9a. Perhaps that experience rendered the District Court hypersensitive to allegations of *Massiah* error. While this possibility may help to illuminate the reasons for the judgment below, however, it cannot substitute for a careful analysis of the constitutional issues, especially when the federal court sits in judgment on the courts of the State by virtue of its power to issue a writ of habeas corpus.

tional Labor Relations Act (NLRA) to empower the NLRB to enjoin a state-court damages action between two private entities, I dissent from the denial of certiorari.

Tonia Anderson was hired by petitioner as a probationary employee for a period of 120 days. After discussing working conditions with other employees, Anderson spoke with her supervisor, informing him of her desire for a number of benefits. After a subsequent meeting attended by Anderson and two supervisors, Anderson was informed that her employment was terminated because her attitude toward her job had changed and, therefore, she would be unable to perform her work satisfactorily.

Anderson then filed unfair labor practices charges with the NLRB, which issued a complaint against petitioner alleging violations of §§ 8(a)(1), (3) of the NLRA, 61 Stat. 140, as amended, 29 U. S. C. §§ 158(a)(1), (3). One day prior to the NLRB hearing on these charges, petitioner filed a damages action against Anderson in state court. Petitioner's complaint alleged that Anderson had contrived a fraudulent scheme in order to obtain a paid vacation with her new husband. The complaint alleged that Anderson knew that if she could provoke petitioner into discharging her, NLRB settlement procedures, following the filing of her unfair labor practice charge, would result in her reinstatement with backpay within a relatively short period of time. The NLRB subsequently issued a second complaint, alleging that petitioner violated §§ 8(a)(1), (4), 29 U. S. C. §§ 158(a)(1), (4), by initiating the damages action against Anderson.

Based solely on the complaint petitioner filed in the state-court action,[1] the NLRB concluded that petitioner violated §§ 8(a)(1), (4) because its damages action "was filed purely for purposes of retaliation to punish Anderson for seeking re-

[1] The complaint was the only item admitted into evidence and no testimony was elicited by any party.

dress for her discharge from the [NLRB] and to discourage other employees from ever emulating Anderson in seeking to enforce their rights."[2] 242 N. L. R. B. 921, 926 (1979). The employer's allegations that Anderson had schemed to obtain a paid vacation were rejected by the NLRB as mere "specu-

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[2]The NLRB purported to rely on the "Clyde Taylor" doctrine, *Clyde Taylor*, 127 N. L. R. B. 103 (1960), for the proposition that the *filing* of a lawsuit in state court may constitute an unfair labor practice and that, as such, may be enjoined by the NLRB. In *Clyde Taylor*, however, the NLRB held only that an employer's *threat to sue* an employee for libel because of the latter's filing of unfair labor practices charges with the NLRB constituted an unfair labor practice. *Id.*, at 108. "By this, we do not mean to deny the existence of the normal right of all persons to resort to the civil courts to obtain an adjudication of their claims." *Ibid.* In accord with this caveat, the NLRB held that the employer's obtaining an injunction in state court banning peaceful picketing resorted to by a union to protest unlawful discharges did not constitute an unfair labor practice. *Id.*, at 109. "[T]he Board should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such a right as an unfair labor practice." *Ibid.*

In *Retail Clerks, Local 770*, 218 N. L. R. B. 680 (1975), the NLRB modified the *Clyde Taylor* doctrine. Although the underlying contractual provision was unlawful, the NLRB held that a union's suit to enforce an arbitration award against an employer did not constitute an unfair labor practice. The NLRB, however, noted that the union's resort to the courts "was done in good faith to enforce a colorable contract right and was not the kind of tactic calculated to restrain employees in the exercise of rights guaranteed by the Act." 218 N. L. R. B., at 683. In *Television Wisconsin, Inc.*, 224 N. L. R. B. 722 (1976), the NLRB found that a union's damages action against an employee seeking to enforce an unlawful union security clause in a collective-bargaining agreement constituted an unfair labor practice under §§ 8(b)(1), (2) of the NLRA, 61 Stat. 141, as amended, 29 U. S. C. §§ 158(b)(1), (2).

Power Systems, Inc., 239 N. L. R. B. 445 (1978), enf. denied, 601 F. 2d 936 (CA7 1979), represents the first instance in which the NLRB has held that an employer committed an unfair labor practice by filing a civil action against an employee. The NLRB found that the civil action was brought in order to pursue an "unlawful objective of penalizing [an employee] for filing a charge with the [NLRB]." 239 N. L. R. B., at 450.

lation."[3] The NLRB ordered petitioner to dismiss its damages action and reimburse Anderson for her legal expenses incurred in defending that suit.[4] The Court of Appeals for the Fourth Circuit enforced the NLRB's order, rejecting, *inter alia*, petitioner's contention that its state-court action was not pre-empted by federal labor law jurisdiction under *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978).

By ordering petitioner to dismiss its damages action against Anderson, it is clear that the NLRB has enjoined a pending lawsuit in state court, even though the NLRB's order is addressed to petitioner and not the state court. See *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 287 (1970). Since 1793, the Anti-Injunction Act has prohibited federal courts from enjoining state-court proceedings, unless the injunction may be justified by one of three specifically defined exceptions. See 28 U. S. C. § 2283. There is no reason why the concerns of federalism

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[3] Thus, the NLRB did not restrict its inquiry to ascertaining the intent behind the suit or its potential coercive effects upon employees who wish to file charges with the NLRB. In *Power Systems*, *supra*, the NLRB also examined the facts underlying the complaint to determine whether the employer had a reasonable basis for filing the lawsuit. *Id.*, at 449–450. That the NLRB will now examine the merits of the civil action is made clear in *Bill Johnson's Restaurants, Inc.*, 249 N. L. R. B. 155, 164–165 (1980).

Thus, the *Clyde Taylor* doctrine has evolved from a policy of noninterference with state-court litigation to a policy of examining the merits of the litigation to determine whether that litigation constitutes an unfair labor practice. The state-court defendant need only persuade the NLRB to order the state-court plaintiff to dismiss the lawsuit. The employee need not utilize the procedures available to him in state court.

[4] In *Television Wisconsin, Inc.*, *supra*, however, the NLRB held that it would be improper for it to order the union to reimburse the employees for the legal expenses they incurred in defending against the damages action. *Id.*, at 781. The NLRB relied upon the "American rule" against providing legal expenses to the prevailing party in a lawsuit from the loser and this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975).

and comity comprehended by the Anti-Injunction Act should not apply to the NLRB as well. As this Court has explained in *Locomotive Engineers*, the premise of the Act is that ours is a country of essentially two separate legal systems. 398 U. S., at 286. Each system functions independently of the other. Our lower federal courts do not have the power to review the decisions of state courts. Only this Court has such a power, and we cannot exercise that power unless some federal issue or interest is at stake. 28 U. S. C. § 1257. This dual system cannot function absent respect by each for the judicial process of the other. Federal interference with the States' judicial processes is no less contrary to the policies underlying § 2283 if that interference comes from a federal agency rather than from a federal court.

I do not doubt that § 8(a)(4) of the NLRA serves an important federal interest in ensuring employees that they may file unfair labor practice charges with the NLRB without fear of reprisal from their employer. Nevertheless, such an interest is insufficient to justify the massive intrusion into the State's judicial processes undertaken by the NLRB in this case. This Court has held that a federal court may not enjoin a pending lawsuit in state court even when "those proceedings interfere with a protected federal right or invade an area pre-empted by federal law, even when the interference is unmistakably clear." *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, *supra*, at 294; see *Clothing Workers* v. *Richman Brothers Co.*, 348 U. S. 511, 517 (1955).

Whatever coercive effect petitioner's state-court action may have had upon its employees' right to file charges with the NLRB, that alone is insufficient to warrant injunctive relief. The NLRB did not consider whether the state-court proceeding interfered with its ability to consider or dispose of Anderson's charges. Unlike *Capital Service, Inc.* v. *NLRB*, 347 U. S. 501 (1954), the state court in the instant case had not taken any action, let alone one that could have

interfered with the NLRB's ability to consider the merits of a matter within its exclusive jurisdiction. If the NLRB concludes that a pending state-court proceeding interferes with its jurisdiction, it may seek an injunction in a federal district court. *Id.*, at 505–506; see 29 U. S. C. § 160(j).

The proper forum to determine the merits of a suit by an employer or a union against an employee is not the NLRB, but the forum in which the suit is brought. If the lawsuit lacks merit, then the court in which the suit was brought will dismiss the suit. If the subject matter of the lawsuit is pre-empted by federal labor law jurisdiction, as the Court of Appeals has determined in the instant case, then the proper tribunal to make such a determination is the court in which the action was brought. If the application of state tort law interferes with the national objective that employees not be impeded in cooperating with the NLRB in enforcing the NLRA, then our decisions have held that the state court may not apply that law. See *Nash* v. *Florida Industrial Comm'n*, 389 U. S. 235, 239–240 (1967). If lower state courts err in their determination of these issues, the party claiming error may appeal through the state system and ultimately to this Court.[5]

Because I do not believe that the NLRB has the power to enjoin an action for damages in state court, I dissent from the denial of certiorari.

No. 80–2194. CROATAN BOOKS, INC. *v.* VIRGINIA. Cir. Ct. Fairfax County, Va. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for certiorari and reverse the conviction.

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[5] In this regard, it should be noted that the state court in the instant case has dismissed petitioner's action against Anderson. App. to Pet. for Cert. A–7. The petition is silent, however, as to whether the lawsuit was dismissed because the complaint failed to state a cause of action under state law or because the subject matter of the dispute was pre-empted by federal law under *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978).

No. 80–6434. BROWN ET AL. *v.* WAINWRIGHT, CORRECTIONS SECRETARY. Sup. Ct. Fla. Certiorari denied. Reported below: 392 So. 2d 1327.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I continue to believe that in all circumstances the death penalty is cruel and unusual punishment. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976). However, I dissent from the denial of certiorari in this case on the additional ground that the Florida Supreme Court practice challenged by petitioners is questionable under prior precedents of this Court and deserves plenary consideration.

Petitioner Brown and 122 other Florida inmates sentenced to death brought original petitions for writs of habeas corpus in the Florida Supreme Court, alleging that since 1975, the Florida Supreme Court has

> "engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. The information includes . . . pre-sentence investigation reports concerning the capital offense under review or prior convictions unrelated to the capital offense; psychiatric evaluations or contact notes [made in the correctional system after conviction]; psychological screening reports; recitations of a capital defendant's refusal to submit to a psychiatric examination from which a report could be prepared; post-sentence investigation reports; probation or parole violation reports; and state prison classification and admissions summaries." App. to Pet. for Cert. 2c–3c.

With rare exceptions, the State Supreme Court allegedly received this information without notice to the appellant whose sentence the court was reviewing or to his attorney. To support these allegations, petitioners offered written re-

quests by the Court Clerk to correctional officials requesting such information, and letters of transmittal from these officials. Petitioners also suggest that this kind of information may have been received in some cases but not others, thus skewing the appellate process without regard to whether the information may benefit the particular appellant whose sentence is under review. The court accepted these allegations as true for the purposes of its decision but denied the petitions.

I believe that the Florida court's *ex parte* consideration of such nonrecord evaluative data relating to individual appellants during the court's review is questionable as a matter of due process and is inconsistent with this Court's past insistence on strict procedural regularity in the imposition and review of capital sentences. See *Gardner* v. *Florida*, 430 U. S. 349 (1977). Moreover, much of the information appears to be inadmissible and unreliable hearsay, which petitioners should at least have the opportunity to cross-examine. Some may be inadmissible under this Court's recent decision in *Estelle* v. *Smith*, 451 U. S. 454 (1981). Accordingly, I dissent.

Gardner, *supra*, invalidated a Florida death sentence in which the sentencing court had relied in part on a confidential portion of a presentencing report that had not been disclosed to the defendant or to his counsel. The plurality opinion emphasized the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." 430 U. S., at 358. Contrary to the State Supreme Court's view, *Gardner* suggested no relevant distinction between the trial court's initial imposition of a sentence and an appellate court's discharge of its mandatory review function. Such a distinction is irreconcilable with this Court's decision in *Proffitt* v. *Florida*, 428 U. S. 242 (1976), which approved the Florida appellate review procedure on

the premise that "the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency." *Id.*, at 258–259 (joint opinion of Stewart, POWELL, and STEVENS, JJ.). If the allegations here are true, then that premise of rationality is clearly invalid.

The State Supreme Court attempted to justify its receipt of this information on the ground that it does not rely on this information in fulfilling its appellate function in capital cases. In reviewing the imposition of the death penalty, the court first reviews each sentence for procedural regularity and then compares the sentence with prior capital cases to ensure that the sentence imposed is not disproportionate. The court stated that these two appellate functions do not involve the reweighing or reevaluating of evidence. Thus, the court concluded, "non-record information we may have seen, even though never presented to or considered by the judge, the jury or counsel, plays no role in capital sentence 'review.'" 392 So. 2d 1327, 1332–1333 (1981).

I am not persuaded. If the court does not use the disputed nonrecord information in performing its appellate function, why has it systematically sought the information? Moreover, the court intimated that it does use the information, although in an undisclosed "procedural" manner: "The 'tainted' information we are charged with receiving was . . . in every instance obtained to deal with newly-articulated procedural standards." *Id.*, at 1333, n. 17. Petitioners are entitled to the assurance either that such information is not sought and placed before the court, or that its use is circumscribed by appropriate safeguards.

If untested by the adversary process, the disputed information may distort the State Supreme Court's appellate functions. When reviewing a sentence for procedural regularity, the court might uphold or vacate the sentence in part

on grounds not considered by the trial court, or on factually erroneous grounds, because it has viewed *ex parte* unreliable, nonrecord information concerning the appellant. And when reviewing sentences for proportionality, the court's comparison of the sentences of other capital defendants with that of the appellant is rendered meaningless if the court has upheld or vacated the death sentences of other individuals after viewing this kind of information, or if the court used possibly erroneous information only as background data for its proportionality determination. The more systematic the practice of reviewing such information, the greater the danger of this second form of distortion.

The court characterized these petitions as "attempts to pervert judicial processes, or to castigate the judiciary," which is simply trying to perform its difficult task of reviewing capital sentences. *Id.*, at 1333. This is exaggeration. Petitioners' position does not preclude the court from considering any record or judicially noticeable information in reviewing sentences. Petitioners are not asking permission to examine the thought processes of appellate judges, or to obtain disclosure of each item of judicially noticeable nonrecord information considered on appeal. They *are* asking permission to examine and dispute the accuracy or completeness of nonrecord information submitted to the court pertaining to that individual appellant.

Because I believe that this practice is questionable on due process and Eighth Amendment grounds, and because I believe that it may distort the mandatory review of capital sentences by the State Supreme Court, I would grant the petition for certiorari. Although petitioners might seek to develop the record on these issues further in a federal habeas corpus proceeding, the existing record is sufficiently disturbing to demand plenary review.

No. 81–53. FLORIDA *v.* GARRETT. Dist. Ct. App. Fla., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 390 So. 2d 95.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

In *Jackson* v. *Indiana*, 406 U. S. 715 (1972), this Court concluded that "on the record before us, Indiana cannot constitutionally commit the petitioner for an indefinite period simply on account of his incompetency to stand trial on the charges filed against him." *Id.*, at 720. It went on to state:

> "Respondent argues, however, that because the record fails to establish affirmatively that Jackson will never improve, his commitment 'until sane' is not really an indeterminant one. It is only temporary, pending possible change in his condition. Thus, presumably, it cannot be judged against commitments under other state statutes that are truly indeterminant. . . .
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> "Were the State's factual premise that Jackson's commitment is only temporary a valid one, this might well be a different case. But the record does not support that premise." *Id.*, at 725.

The *Jackson* Court went on to discuss *Greenwood* v. *United States*, 350 U. S. 366 (1956), and held that it did not support Indiana's position, since it merely "upheld the Federal Government's constitutional authority to commit an individual found by the District Court to be 'insane,' incompetent to stand trial on outstanding criminal charges, and probably dangerous to the safety of the officers, property, or other interests of the United States." 406 U. S., at 726.

In the present case, the Florida District Court of Appeal reversed respondent's murder conviction on the ground that, prior to trial, he had been committed to a state hospital longer than necessary to assess the likelihood of his eventual

recovery of competency to stand trial. In my view, the decision rests on a serious misunderstanding of this Court's opinion in *Jackson*, *supra*. In light of the risk that the error will be repeated if not corrected, I would grant the petition.

On July 7, 1970, respondent was indicted for the first-degree murder of a police officer. He was arraigned and entered pleas of not guilty and not guilty by reason of insanity. Following a hearing on September 14, 1970, the trial court found respondent incompetent to stand trial and committed him to a state hospital. Three psychiatrists testified that respondent was suffering from paranoid schizophrenia and that episodes of the illness were likely to recur without intensive treatment. The psychiatrists also agreed that respondent posed a serious danger to himself and to others.[1]

Over the next six years, the trial court ordered periodic psychiatric examinations of respondent and conducted five hearings to reevaluate his competency to stand trial. In hindsight, the hearings reveal a recurrent pattern of behavior. While institutionalized, respondent received large doses of psychotropic medication, which, in the opinion of the examining psychiatrists, were successful in restoring his competency to stand trial. The trial court, however, apparently was of the view that it could not reach a valid determination of competency as long as respondent was under the influence of medication. This view was shared by respondent's counsel and by at least one of the examining psychiatrists. As a result, the court ordered withdrawal of medication and reevaluation. Typically, respondent severely regressed without medication. On the occasion of each reevaluation, the examining psychiatrists found respon-

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[1] On October 7, 1970, respondent was also charged with second-degree arson. Following his arraignment on that charge, a second judge, relying on the decision of the first, also found respondent incompetent to stand trial and ordered him committed to the state hospital. Both cases later were assigned to a single judge.

dent both incompetent to stand trial and dangerous to himself and others. And on each such occasion, the trial court recommitted respondent to the state hospital.

A sixth competency hearing was held in November 1977. Psychiatric testimony again indicated that respondent, although under medication, was competent to stand trial. Defense counsel argued that respondent could not be considered competent because remission of his illness was the result of continuing psychotropic medication, which might affect respondent's ability to assist in the preparation of a defense. This time, however, the trial court found respondent competent to stand trial. Prior to the sixth competency hearing, Florida had enacted a statute that expressly permitted an adjudication of competency while under medication. 1977 Fla. Laws, ch. 77–312 (current version at Fla. Stat. § 916.12(2) (Supp. 1980)).

At this point, the tactics of the defense counsel and the reasoning of the Florida Court of Appeal diverged sharply from this Court's *Jackson* opinion. Defense counsel moved for dismissal of the indictment on the ground that respondent had been deprived of the right to a speedy trial secured by both state and federal law. Following denial of that motion and unsuccessful appellate proceedings in which he sought a writ of prohibition, respondent entered a plea of *nolo contendere*. An appeal followed in which respondent exclusively argued that he had been deprived of his state and federal rights to a speedy trial. The Florida District Court of Appeal reversed, but relied on *Jackson* v. *Indiana* to do so. 390 So. 2d 95 (1980).

In my view, the court's decision is not supported, much less compelled, by *Jackson* v. *Indiana*. The petitioner in that case challenged his indefinite confinement in a mental hospital pending his recovery of competency to stand trial. In addition to the statute under which petitioner was com-

mitted, Indiana had enacted two other laws authorizing the civil commitment of persons found to be mentally ill. Those statutes contained more demanding commitment standards and more lenient standards of release than the statute that authorized petitioner's commitment. This Court held that the unequal treatment of petitioner under the latter statute was not justified by the mere pendency of criminal charges against him. 406 U. S., at 729–730. As a matter of due process, the Court also held:

> "[A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant." *Id.*, at 738.

Jackson, therefore, recognized limits on the power of a State indefinitely to confine an accused "solely on account of his incapacity to proceed to trial." As the Court was aware, however, that holding does not address the power of the State to *try*, and thus to convict, the accused once he has regained competency to face the charges against him. See *id.*, at 739–740. It is foreseeable that once that time arrives, the defendant may allege that he has been deprived of the right to a speedy trial guaranteed by the Sixth and Fourteenth Amendments. The respondent in this case relied precisely, and exclusively, on such an argument in the District Court of Appeal. See Brief in Opposition 4. That court, however, reversed his conviction "on the basis that, under the holding of *Jackson* v. *Indiana*, . . . he should never have been brought to trial." 390 So. 2d, at 96. Since *Jackson* did not

address the power of the State to bring an accused to trial, it affords no basis for reversing respondent's conviction.[2]

The holding of the District Court of Appeal reflects other misconceptions about *Jackson* v. *Indiana*. *Jackson* turned largely on the contrast between Indiana's standards for commitment and release applicable to those committed solely because of their lack of capacity to stand trial and comparable standards governing civil commitment under two alternative state laws. The Court concluded that Jackson had been deprived of substantial rights to which he would have been entitled under either of the alternative commitment statutes. See 406 U. S., at 727–730. Moreover, there was serious doubt that Jackson could have been committed, or kept long in confinement once committed, if judged according to those statutes. *Ibid.* The District Court of Appeal undertook no similar comparison in respondent's case.

The result in *Jackson* also rested on due process grounds. The Court held that Indiana could not indefinitely confine an accused, "*solely* on account of his incapacity to proceed to trial," without determining the likelihood that he would regain competency. *Id.*, at 738 (emphasis added). Central to the result in *Jackson* was Indiana's complete failure to rely on any basis for committing the petitioner other than his incompetency to stand trial.[3] By way of contrast, the Court

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[2] If *Jackson* had purported to limit the power of the State to try an accused because of an unlawful pretrial commitment, it would have marked a drastic departure from the "established rule that illegal arrest or detention does not void a subsequent conviction." *Gerstein* v. *Pugh*, 420 U. S. 103, 119 (1975).

[3] "The States have traditionally exercised broad power to commit persons found to be mentally ill. . . . The bases that have been articulated include dangerousness to self, dangerousness to others, and the need for care or treatment or training. . . .

". . . It is clear that Jackson's commitment rests on proceedings that did not purport to bring into play, indeed did not even consider relevant, *any*

recalled the decision in *Greenwood* v. *United States*, 350 U. S. 366 (1956), which upheld the pretrial commitment of a defendant under 18 U. S. C. §§ 4244 to 4246, "even though there was little likelihood that he would ever become competent to stand trial." 406 U. S., at 732. The Court noted that Greenwood, unlike Jackson, had been found not only incompetent, but dangerous. *Ibid.* In addition, Greenwood, unlike Jackson, was entitled to release when no longer dangerous. *Ibid.* As the Court's discussion of federal law made clear, the constitutionality of indefinite commitment without an assessment of eventual capacity is dependent on the purposes for which commitment is ordered.

These distinctions apparently escaped the Florida District Court of Appeal in the instant case. Petitioner notes that every examination of respondent prior to the last, in November 1977, produced findings that respondent was not merely incompetent: he was extremely dangerous to himself and others and in need of treatment. Pet. for Cert. 3–16. Only the most careless reading of *Jackson* and its reference to *Greenwood*, *supra*, would render it controlling in such circumstances. *Jackson* dealt with the pretrial confinement of one accused of crime, and there is no solace to be gleaned from it of a federal constitutional due process limit on the authority of a State to confine an accused found dangerous to himself and others.

In opposition, respondent maintains that the opinion of the District Court of Appeal contains language "strongly suggest[ing] the likelihood that the court below's decision was based not on federal constitutional principles, but on for-

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of the articulated bases for exercise of Indiana's power of indefinite commitment. . . . At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson* v. *Indiana*, 406 U. S., at 736–738 (footnote omitted).

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mer Florida Rule of Criminal Procedure 3.210(a)(5)." Brief in Opposition 4. That Rule, which was in effect from 1972 to 1977, provided that a trial court which found no substantial probability that a defendant would become competent to stand trial was required to "adjudge the defendant not guilty by reason of insanity and forthwith direct the institution of civil proceedings for the commitment of the defendant." Although this Rule might have provided an adequate and independent state ground for reversing respondent's conviction, it is neither discussed nor cited in the court's decision and respondent concedes that he did not argue the Rule below. *Id.*, at 5. The Rule, in fact, had been repealed prior to the appeal of respondent's conviction, and his reliance on it in earlier competency hearings had proved consistently unavailing.[4]

The rationale of a court's decision usually is to be gleaned from the explanation given by the court. In this case, the explanation rests entirely on an erroneous interpretation of a decision by this Court. Rather than indulge in improbable speculation about what the court meant, as opposed to what it said, I would grant the petition for certiorari.[5]

No. 81–60. HOPPER, WARDEN *v.* JOHNSON, AKA BROOKS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 639 F. 2d 236.

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[4] According to petitioner, respondent originally moved for an adjudication of insanity in reliance on the Rule at a competency hearing held in April 1973. Pet. for Cert. 7–8. The motion was denied and an appeal of the denial was subsequently dismissed. *Garrett* v. *State*, 283 So. 2d 905 (Fla. App. 1973). Respondent apparently renewed the motion at competency hearings in June 1974, December 1975, October 1976, and March 1977.

[5] Even if respondent's suggestions were sufficiently plausible to reveal ambiguities in the court's opinion, at most they would counsel this Court to grant the petition, vacate the judgment, and remand for reconsideration in light of *California* v. *Krivda*, 409 U. S. 33 (1972).

No. 81-99. KOLOM ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 644 F. 2d 1282.

JUSTICE POWELL, dissenting.

In the decision below, "fair market value" of a share of stock for minimum-tax purposes was determined solely by reference to the New York Stock Exchange (NYSE) price at the time of purchase even though § 16(b) of the Securities Exchange Act of 1934, 48 Stat. 896, 15 U. S. C. § 78p(b), effectively prohibited the taxpayer's sale of the security for six months thereafter. The case presents an important question of fairness to taxpayers, who, under this ruling, must recognize a "gain" that does not yet exist and may never materialize. Because the decision below is not supported by either the statutory language or its legislative history and because it tends to frustrate the congressional policy favoring employee stock ownership, I would grant certiorari and set the case for argument.

I

In 1968, 1970, and 1971, petitioner Aaron L. Kolom received options to acquire stock in Tool Research and Engineering Corp. (TRE) pursuant to a plan that qualified under § 421 and § 422 of the Internal Revenue Code of 1954 (IRC), as amended, 26 U. S. C. § 421 and § 422. Kolom exercised the options in September and October 1972 when he was an officer and director of TRE. He bought a total of 12,427 shares in three blocks at an average of 13¼, 12, and 19⅝, per share. On the dates of exercise, the mean prices of the stock on the NYSE were, respectively, 52, 45¼, and 45¼.

Because Kolom was a TRE director, he was not free to take this "gain." Under § 16(b) of the Securities Exchange Act, 15 U. S. C. § 78p(b), Kolom would have been liable to the company for any profits realized from the sale of these shares during the 6-month period following exercise of his op-

tion. And by the time Kolom was able to sell, the situation had altered dramatically. Six months after the date of exercise of the first block, the NYSE price dropped over 50% to 23⅝. Six months after the date of exercise of the other two blocks, the NYSE price also dropped over 50% to 20⅞. Kolom eventually sold 5,000 of the shares for an average price of $9.27 per share, realizing a substantial loss on the transaction.

Under the IRC provisions in effect at that time, the exercise of the options did not result in any recognized compensation for purposes of calculating income because the TRE Employee Stock Option Plan (Plan) qualified under § 421 and § 422. Tax on stock transferred under a qualified plan is deferred until the stock is sold, and any gain is then taxed at capital-gains rates provided certain other requirements are met.

Stock received pursuant to a qualified plan can, however, result in tax liability under the minimum-tax provisions. Title 26 U. S. C. § 56 and § 57 (1976 ed. and Supp. III) impose a tax on certain "preference" items, including stock received under plans that qualify under § 421 and § 422. The Commissioner audited Kolom's 1972 return and assessed a deficiency on the ground that, for purposes of calculating his minimum tax, Kolom should have included as a "preference" item the difference between the option price and the NYSE price at the time each option was exercised. The Commissioner argued that Kolom should have included his "gain" of $424,888 as a preference item even though Kolom could not have realized the gain and even though the gain evaporated in the course of the six months following exercise of the option. This fictional gain resulted in a deficiency assessment of $43,792. The Tax Court affirmed the Commissioner, as did the Court of Appeals for the Ninth Circuit.

II

"As is true in every case involving the construction of a statute, our starting point must be the language employed by

Congress." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979). See also *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J. concurring). For purposes of calculating the minimum tax, "tax preference items" include stock transferred pursuant to a qualified plan to the extent "*the fair market value* of the share at the time of exercise exceeds the option price." IRC §57(a)(6) (emphasis added). Thus, under the express terms of the statute, the amount included as a "preference" item is only the difference between the fair market value at the time the option is exercised and the option price.

As this Court noted in *United States* v. *Cartwright*, 411 U. S. 546, 551 (1973), "[t]he willing buyer-willing seller test of fair market value is nearly as old as the federal income, estate, and gifts taxes themselves." The *Cartwright* Court described fair market value as "'the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.'" *Ibid.* (quoting Treas. Reg. §20.2031–1(b)).

At the time he exercised his option, Kolom would not have sold willingly at the NYSE price. Indeed, he would not have sold willingly at *any* price above the option price on that date or any date during the next six months because he then would have been obligated to pay to the corporation the entire amount of the "gain." In the past, this Court has taken into account such constraints in determining fair market value. In *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481 (1937), the taxpayers, pursuant to the terms of a corporate reorganization, received stock that was restricted against sale for a period of up to six months. The Court held that "the shares of . . . stock, regard being had . . . to the terms of a restrictive agreement making a sale thereof impossible, did not have a fair market value, capable of being ascertained with reasonable certainty, when they were acquired by the taxpayers." *Id.*, at 499. See also *MacDonald* v. *Commis-*

sioner, 230 F. 2d 534, 539–541 (CA7 1956) (applying *Tex-Penn* in finding no recognizable gain in purchase by corporate insider liable under § 16(b)).

III

The basis for the Commissioner's unrealistic interpretation of "fair market value" in the case at bar is Treas. Reg. § 1.57–1(f)(3), which states:

> "In accordance with the principles of section 83(a)(1), the fair market value of a share of stock received pursuant to the exercise of a qualified or restricted stock option is to be determined without regard to restrictions (other than nonlapse restrictions within the meaning of § 1.83–3(h)). Notwithstanding any valuation date given in section 83(a)(1), for purposes of this section, fair market value is determined as of the date the option is exercised." 26 CFR § 1.57–1(f)(3) (1980).

But by applying the "principles of section 83(a)(1)" to the valuation of qualified stock under § 57(a)(6), this Treasury Regulation ignores basic differences in the language and purposes of the two sections. Most significantly § 57 is directed to the capture, for minimum-tax purposes, only of stock acquired pursuant to *qualified* plans under § 421 and § 422. By contrast, § 83 is directed solely at the taxation of those options that are *not* acquired as part of such plans. IRC § 83(e) states explicitly that the income tax imposed on restricted stock by § 83 does not apply to stock transferred under qualified plans. Thus, the Commissioner has applied the § 83(a) valuation technique to a transfer of *qualified* stock even though Congress has stated that § 83 is of no relevance to transfers of that type.

A brief glance at the legislative history explains the policy basis for the difference in treatment of stock issued under qualified plans and stock issued under plans that do not qualify. As the Joint Committee on Internal Revenue Taxation

explained, § 83 was enacted to impose income tax on so-called "restricted stock plans" which were used to defer compensation actually owed employees. See Joint Committee on Internal Revenue Taxation, General Explanation of the Tax Reform Act of 1969, H. R. 13270, 91st Cong., Pub. L. 91–172, pp. 109–111 (Comm. Print 1970). Under some deferred-compensation plans involving stock, an employee could postpone his tax liability even though he had effective control over the stock with little or no risk of forfeiture. To capture the gain effectively realized under such plans, Congress enacted § 83(a), which provides that stock purchased by an employee is income to the extent its fair market value exceeds purchase price, without regard to restrictions that lapse. *Ibid.* In short, Congress enacted § 83 for the purpose of ending tax avoidance schemes using spurious restrictions.

Congress did not, however, intend to tax, as compensation in the year received, *all* stock transferred to employees because such treatment would defeat another congressionally favored policy: long-term employee ownership of company stock. It is this policy that justifies the favored treatment accorded qualified stock option plans. Employees are less likely to buy *and hold* stock if they must realize a theoretical gain in the year of purchase even though in fact they receive no cash with which to pay the tax. Congress therefore provided that transfers pursuant to plans that qualify under § 421 and § 422—plans that give employees a "stake" in the business rather than simply deferring compensation—are exempt from the income tax imposed by § 83(a). See, *e. g.*, H. R. Rep. No. 91–413, pt. 1, p. 87 (1969).[1]

[1] Transfers of stock under plans that qualify under § 421 and § 422 are, *by definition*, a legitimate transfer of a "stake" in the employer to the employee. In order to qualify under § 422(b), the option must have a maximum term of five years and the option price cannot be less than the market price of unrestricted stock at the time the employee receives the option. In addition, in order to defer tax recognition under § 421, the employee

It is this policy of encouraging employee stock ownership that explains why the language of § 57 and § 83 differs. Both sections were enacted as part of the Tax Reform Act of 1969. Yet § 57, imposing minimum tax on the transfer of qualified stock, uses *only* the words "fair market value," whereas § 83, seeking to end tax avoidance through the use of *non*-qualifying stock and spurious restrictions, modifies that phrase with a parenthetical indicating that restrictions that lapse are to be ignored. Congress' failure to include any similar qualification in § 57 strongly suggests that it intended to use "fair market value" in its traditional and well-established sense. Any other understanding of the term would defeat the purpose §§ 57, 421, and 422 were designed to serve.

Kolom received his options under a plan that qualified under § 422(b). Because his transactions met the requirements of that section, the stock represented "a stake in the business," and Kolom was entitled to defer recognition under § 83(e). Only a rash speculator would have exercised those options to obtain the "stake" in the corporate employer encouraged by § 421 and § 422 with the knowledge that he thereby could be liable for a substantial tax under the minimum-tax provisions on a gain that, by law, he could not realize. The decision below, imposing tax under such circumstances, is inconsistent with the congressional policy of encouraging long-term employee ownership of company stock and with the plain language of the statute.[2]

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cannot sell qualifying stock for a period of at least three years after the grant of the option and must still be an employee within three months of the exercise of the option. Thus, any difference between the option price and the NYSE price at the time the option is exercised represents the employee's "stake" in his corporate employer during the term of his employment *after* the receipt of the option rather than an attempt to avoid taxes by attaching ephemeral restrictions to stock transferred to the employee at less than its market value at the time of the transfer.

[2] Petitioner husband argues that the Commissioner's action deprived him of property without due process of law. Because I would decide the case on statutory grounds, I would not reach this issue.

The present interpretation of these provisions by the IRC also results in a degree of unfairness that hardly could have been intended by Congress. The case merits plenary consideration by the Court.

No. 81–122. VALLEY NEWS *v.* MCCUSKER. Sup. Ct. N. H. Motion of American Newspaper Publishers Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 121 N. H. 258, 428 A. 2d 493.

No. 81–201. GENERAL MOTORS CORP. *v.* GORSUCH, ADMINISTRATOR, UNITED STATES ENIVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 210 U. S. App. D. C. 205, 655 F. 2d 318.

No. 81–383. MCCORMICK *v.* EDWARDS, GOVERNOR OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 646 F. 2d 173.

No. 81–5104. BARRY *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 86 N. J. 80, 429 A. 2d 581.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The question presented in this case is whether petitioner's confession, obtained by police after he had been arrested without probable cause, held in custody for some 18 hours, and confronted with the confessions of three other participants in the crime, should have been excluded at petitioner's trial as an inadmissible fruit of an unconstitutional arrest.

On January 12, 1976, the First Federal Savings and Loan Association of Montclair, N. J., was robbed. Investigation revealed information sufficient for the issuance of an arrest warrant for Archie Murphy. On the evening of January 15,

1976, police went to an East Orange, N. J., apartment building to execute the arrest warrant for Murphy. Upon arrival, one officer saw petitioner Edward Barry standing outside the building. Recognizing him from his investigation of another robbery one year earlier, the officer arrested petitioner and gave him *Miranda* warnings. Murphy was arrested inside the building.

Petitioner and Murphy were first taken to the East Orange police station, then to Montclair Police Headquarters. Petitioner was transferred to the Glen Ridge jail for overnight lodging. In the early morning hours of January 16, Murphy made a statement incriminating himself and identifying petitioner as the driver of the getaway car. At midday on January 16, after petitioner had been in custody for approximately 18 hours, he was taken from Glen Ridge jail to Montclair for questioning. He was again given *Miranda* warnings and was told that his brother, Murphy, and another suspect had all confessed to the robbery and that he had been implicated. He was also shown the weapons used in the robbery. Confronted with these matters, petitioner gave a written statement revealing his participation in the robbery.

Petitioner was convicted. His confession was the principal evidence against him. The Appellate Division reversed, holding that petitioner's confession should have been excluded from evidence as the product of an illegal arrest. 171 N. J. Super. 543, 547–548, 410 A. 2d 259, 262 (1979). The Supreme Court of New Jersey reinstated the judgment of conviction. It agreed with the lower court that the arrest was illegal because "the police at that time were without probable cause to arrest," 86 N. J. 80, 88, 429 A. 2d 581, 585 (1981), but went on to determine whether the confession resulted from exploiting the illegal arrest or instead was the product of petitioner's free will, the taint of the illegal arrest having been removed. The court held that the intervening circumstances, including Murphy's confession and the recov-

ery of the guns used in the robbery, severed any causal link between the illegal arrest and the subsequent confession and therefore the confession was properly admitted. Other courts have arrived at very similar results,[1] but I have serious doubt that these cases can be squared with our own recent decisions.

In order for a statement given to police after an illegal arrest to be admissible at trial, the statement must not only be voluntary by Fifth Amendment standards, but it must also not be the result of exploiting the illegal arrest; rather, it must be "an act of free will [sufficient] to purge the primary taint." *Wong Sun* v. *United States*, 371 U. S. 471, 486 (1963); *Brown* v. *Illinois*, 422 U. S. 590, 602 (1975). *Brown* held that *Miranda* warnings, by themselves, cannot always make a confession "sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." 422 U. S., at 603. By focusing on the causal connection between an illegal arrest and a subsequent confession, *Brown* sought to implement the policies behind the use of the exclusionary rule to effectuate the Fourth Amendment. *Dunaway* v. *New York*, 442 U. S. 200, 218–219 (1979). It identified three factors for determining whether it is necessary to exclude a confession obtained following an illegal arrest: "The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant." *Brown* v. *Illinois*, *supra*, at 603–604 (footnotes omitted).

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[1] See, *e. g.*, *In re R. S.*, 93 Ill. App. 3d 941, 418 N. E. 2d 195 (1981); *People* v. *Finch*, 86 Ill. App. 3d 493, 408 N. E. 2d 87 (1980); *People* v. *Emanuel*, 98 Mich. App. 163, 295 N. W. 2d 875 (1980); *People* v. *Gabbard*, 78 Ill. 2d 88, 398 N. E. 2d 574 (1979); *State* v. *Lewis*, 19 Wash. App. 35, 573 P. 2d 1347 (1978); *Commonwealth* v. *Bogan*, 482 Pa. 151, 393 A. 2d 424 (1978); but cf. *United States* v. *Butler*, 495 F. Supp. 679 (ED Ark. 1980).

Brown obviously raises serious questions about the admissibility of petitioner's confession. That petitioner confessed after being held for 18 hours while the defendant in *Brown* confessed after only 2 hours is not dispositive. As JUSTICE STEVENS has observed: "The temporal relationship between the arrest and the confession may be an ambiguous factor. If there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one." *Dunaway* v. *New York*, *supra*, at 220 (concurring opinion). See also *Hale* v. *Henderson*, 485 F. 2d 266, 267–269 (CA6 1973), (ordering suppression of statement made 42 hours after illegal arrest), cert. denied, 415 U. S. 930 (1974), cited in *Brown* v. *Illinois*, *supra*, at 603, n. 8; 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 633–634 (1978).

The court below held that the causal chain between the illegal arrest and the confession was broken by disclosing Murphy's confession to petitioner and showing him the weapons used in the robbery. But in *Brown*, as here, the police gave the defendant *Miranda* warnings, confronted him with the evidence they had against him, and this Court held the ensuing confession was inadmissible. 422 U. S., at 594. The events between the illegal arrest and the confession were characterized in unequivocal terms: "Brown's first statement was separated from his illegal arrest by less than two hours, *and there was no intervening event of significance whatsoever.*" *Id.*, at 604 (emphasis added). We have thus rejected the notion that the causal chain between an illegal arrest and a subsequent confession is broken by merely confronting the accused with evidence of his guilt in an effort to elicit an incriminating response. Rather, "some demonstrably effective break in the chain of events leading from the illegal arrest to the statement" is required. *Id.*, at 611 (POWELL, J., concurring in part). See *Johnson* v. *Louisiana*, 406 U. S. 356, 365 (1972) (appearance before neutral magistrate and

representation by counsel at lineup purged lineup of taint from illegal arrest), cited in *Brown* v. *Illinois*, *supra*, at 604. See also *Wong Sun* v. *United States*, *supra*, at 491 (actual release from detention prior to confession breaks chain).

In terms of the purposes of the exclusionary rule, allowing a confrontation such as occurred in this case to qualify as an intervening circumstance would permit the police to seize and detain any person without probable cause, secure in the knowledge that a confession later obtained by confronting the accused with evidence against him would be admissible. I had thought that this is what the Court sought to prevent in *Brown* and *Dunaway*, since "[h]ostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment." *Dunaway* v. *New York*, *supra*, at 213.

The third *Brown* factor to be considered is the purpose and flagrancy of the police conduct. Although the police conduct here was not designed to cause fright and confusion as it was in *Brown*, 422 U. S., at 605, the police admittedly lacked probable cause to arrest petitioner, and the purpose of the arrest was to detain "in the hope that something might turn up." *Ibid.* This purpose is itself sufficient to exclude a confession, absent a sufficient intervening event. *Dunaway* v. *New York*, *supra*, at 218.[2]

Perhaps the decision below should stand, but the tension between it and our own cases such as *Brown* is apparent, and it should either be reversed or our own decisions reconsidered and modified. I would grant the petition for certiorari.

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[2] As one commentator has suggested: "[I]n light of the inherent difficulties in establishing that police acted with an improper motive, it does not follow from this that an otherwise inadmissible confession deserves to be admitted into evidence simply because there has been no showing of a flagrant and purposeful Fourth Amendment violation. This is *a* factor, not the controlling factor . . . and thus must be considered with . . . 'the presence of intervening circumstances.'" 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 635–636 (1978) (footnotes omitted).

No. 81–5107. TUCKER *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County; and

No. 81–5338. STRAIGHT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 81–5338, 397 So. 2d 903.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 81–5136. EDWARDS *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied. JUSTICE BRENNAN would grant certiorari.

Rehearing Denied

No. 80–1322. FAMILIA DE BOOM ET AL. *v.* AROSA MERCANTIL, S. A., ET AL., 451 U. S. 1008. Motion for leave to file petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 80–6647. MCCOLPIN *v.* LAMUNYON, *ante*, p. 842; and

No. 81–5051. IN RE MCGEAN, *ante*, p. 869. Petitions for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

NOVEMBER 9, 1981

Affirmed on Appeal

No. 80–1604. BROCKETT, SPOKANE COUNTY PROSECUTING ATTORNEY, ET AL. *v.* SPOKANE ARCADES, INC., ET AL. Affirmed on appeal from C. A. 9th Cir. Reported below: 631 F. 2d 135.

CHIEF JUSTICE BURGER, with whom JUSTICE POWELL and JUSTICE REHNQUIST join, dissenting.

The Court today affirms a decision of the Court of Appeals holding unconstitutional a Washington statute which has yet

either to be enforced in or construed by a Washington state court. I would abstain from decision until the Washington courts are given an opportunity to interpret the law which has been thus invalidated. This Court—and all federal courts—have enough to do without "pre-empting" state courts on matters initially of state concern.

The Washington "moral nuisance" law, Wash. Rev. Code § 7.48.050 *et seq.* (Supp. 1977)—a comprehensive statute directed at prohibiting the public sale and exhibition of obscene materials—was adopted as an initiative by the voters in the November 8, 1977, election. Before the statute was even certified by the Secretary of State, appellees, several corporations engaged in the exhibition, distribution, and sale of movies, books, and magazines, filed this action in the Federal District Court. On February 6, 1978, less than three months after the initiative's adoption, and apparently before it had ever been applied, the District Court declared the law unconstitutional. 449 F. Supp. 1145.

I have previously outlined the concerns that should lead a federal court to stay its hand in cases such as this, when litigants have deliberately avoided resort to the courts of the state whose statute is being challenged. *Vance* v. *Universal Amusement Co.*, 445 U. S. 308, 317–320 (1980) (BURGER, C. J., dissenting); cf. *Moore* v. *East Cleveland*, 431 U. S. 494, 521–531 (1977) (BURGER, C. J., dissenting); *Wisconsin* v. *Constantineau*, 400 U. S. 433, 439–443 (1971) (BURGER, C. J., dissenting). The policies of federalism and comity militate in favor of affording state judges—who are as capable as are federal judges of enforcing the Constitution of the United States, and have taken the same oath to do so—the initial opportunity to consider the scope and validity of state statutes. This is particularly so when the state law under consideration has never been applied, and when its interpretation is uncertain; in such a case the state court's construction of the statute may obviate the need for adjudication of the federal constitutional issues, or the state court may resolve those issues as we would. *Harrison* v. *NAACP*, 360 U. S.

167 (1959); *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639 (1959); *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941).

Here, the Court of Appeals invalidated portions of the nuisance law dealing with the issuance of temporary and permanent injunctions against establishments exhibiting "lewd" or "obscene" matter, on the grounds that, *inter alia*, (1) "[n]o limits are set forth in the statute to confine the discretion of the court to issue the temporary abatement injunction," 631 F. 2d 135, 138 (CA9 1980); (2) "there is no assurance that there will occur the required prompt final judicial determination on the merits," *ibid.*; and (3) "a defense of nonobscenity *presumably* is unavailable at a trial for violation of an injunction" (emphasis added), *ibid.* Even a cursory examination of the lengthy statute—which contains detailed definitions of "lewd" or "obscene" matter incorporating the standards of *Miller* v. *California*, 413 U. S. 15 (1973), which provides for consolidation of the trial on the merits with the hearing on the temporary injunction and grants scheduling priority to cases brought under the statute, and which does not specify the defenses available in contempt proceedings—discloses that the state courts might well have construed the law so as to avoid each of these perceived deficiencies. It is ironic that, having exhibited no hesitation to construe the many provisions of this complex statute without guidance from the state courts, the Court of Appeals wholly ignored an explicit severability clause and "declined" to preserve those parts of the statute *not* found unconstitutional, demurring that the reconstruction required to salvage the statute would be better handled by "the legislature of the State of Washington." 631 F. 2d, at 139.

In sum, both the District Court and the Court of Appeals should have declined to act until the parties had exhausted available state remedies, at least absent a showing that resort to the state courts would have been futile. There was no need whatever for federal courts to render a declaratory

judgment as to the validity of a state law on which the state courts have not yet had an opportunity to speak and on behalf of parties against whom the law has not yet been applied. I would reverse and remand with directions to do now what should have been done initially.

No. 81–186. MCCLURE, UNITED STATES SENATOR *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. Affirmed on appeal from D. C. Idaho. JUSTICE REHNQUIST took no part in the consideration or decision of this case. Reported below: 513 F. Supp. 265.

Appeals Dismissed

No. 81–477. WITTE *v.* BAR COMMITTEE OF THE TWENTY-FIRST JUDICIAL CIRCUIT. Appeal from Sup. Ct. Mo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 615 S. W. 2d 421.

No. 81–5422. CRANE *v.* ROSS ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 645 F. 2d 78.

No. 81–478. RABIDEAU *v.* ATTORNEYS BOARD OF PROFESSIONAL RESPONSIBILITY OF WISCONSIN. Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question. Reported below: 102 Wis. 2d 16, 306 N. W. 2d 1.

No. 81–524. JOHNSON *v.* KERR-MCGEE OIL INDUSTRIES, INC. Appeal from Ct. App. Ariz. dismissed for want of substantial federal question. Reported below: 129 Ariz. 393, 631 P. 2d 548.

No. 81–505. CAFFIERO ET UX. *v.* BOARD OF EDUCATION OF PISCATAWAY TOWNSHIP ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 86 N. J. 308, 431 A. 2d 799.

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No. 81–533. AETNA LIFE & CASUALTY CO. ET AL. *v.* YOUNG ET AL. Appeal from Super. Ct. Conn., Fairfield County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

No. 81–5433. TRAVIS *v.* IOWA EX REL. BISHOP. Appeal from Sup. Ct. Iowa dismissed for want of jurisdiction. Reported below: 306 N. W. 2d 733.

Certiorari Granted—Vacated and Remanded

No. 81–384. STATE FAIR OF TEXAS *v.* UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION; and

No. 81–555. STECK & STAPF ATTRACTIONS, INC. *v.* UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION. C. A. 5th Cir. Certiorari granted, judgment vacated, and cases remanded to the United States District Court for the Northern District of Texas with directions to dismiss as moot. *United States* v. *Munsingwear*, 340 U. S. 36 (1950). Reported below: 650 F. 2d 1324.

Certiorari Granted—Reversed. (See No. 80–1942, *ante*, p. 14.)

Miscellaneous Orders

No. — – ——. TIFFANY CONSTRUCTION CO., INC. *v.* BUREAU OF REVENUE OF NEW MEXICO. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. D–239. IN RE DISBARMENT OF FAHY. Disbarment entered. [For earlier order herein, see 451 U. S. 1015.]

No. D–243. IN RE DISBARMENT OF WITTE. Disbarment entered. [For earlier order herein, see 453 U. S. 910.]

No. D–252. IN RE DISBARMENT OF RAWLINS. It is ordered that Earl A. Rawlins, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–253. IN RE DISBARMENT OF CALDWELL. It is ordered that C. Lee Caldwell, of American Fork, Utah, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 91, Orig. CALIFORNIA *v.* WEST VIRGINIA. Motion for leave to file bill of complaint denied.

JUSTICE STEVENS, dissenting.

The State of California invokes this Court's jurisdiction to adjudicate a controversy with the State of West Virginia arising out of an alleged breach of contract covering athletic contests between two state universities. Congress has provided that this Court's jurisdiction over controversies between two States is exclusive.* Although the Court has explained why it will decline to exercise its nonexclusive jurisdiction over cases in which only one of the parties is a

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*Title 28 U. S. C. § 1251 (1976 ed., Supp. III) provides:

"(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

"(b) The Supreme Court shall have original but not exclusive jurisdiction of:

"(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

"(2) All controversies between the United States and a State;

"(3) All actions or proceedings by a State against the citizens of another State or against aliens."

State, see *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, that explanation is inapplicable to cases in which our jurisdiction is exclusive. The fact that two sovereign States have been unable to resolve this matter without adding to our burdens does not speak well for the statesmanship of either party but does not, in my opinion, justify our refusal to exercise our exclusive jurisdiction under 28 U. S. C. § 1251(a) (1976 ed., Supp. III). I would grant the motion for leave to file and refer the case to a special master.

No. 79–1738. NIXON *v.* FITZGERALD; and

No. 80–945. HARLOW ET AL. *v.* FITZGERALD. C. A. D. C. Cir. [Certiorari granted, 452 U. S. 959.] Motions of Orrin G. Hatch et al., National Taxpayers Legal Fund, Inc., and Government Accountability Project of the Institute for Policy Studies for leave to file briefs as *amici curiae* granted.

No. 80–1608. UNITED STATES *v.* JOHNSON. C. A. 9th Cir. [Certiorari granted, *ante*, p. 814.] Motion for appointment of counsel granted, and it is ordered that John F. Walter, Esquire, of Los Angeles, Cal., be appointed to serve as counsel for respondent in this case.

No. 80–1765. AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. *v.* HYDROLEVEL CORP. C. A. 2d Cir. [Certiorari granted, 452 U. S. 937.] Motion of Stephen G. Glatzer et al. for leave to file a brief as *amici curiae* denied. Motion of National Commission for Health Certifying Agencies for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of National Fire Protection Association for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied. Motion of Adolph J. Ackerman for leave to file a brief as *amicus curiae* granted.

No. 80–1199. AMERICAN TOBACCO CO. ET AL. *v.* PATTERSON ET AL. C. A. 4th Cir. [Certiorari granted, 452 U. S. 937.] Motion of petitioners for divided argument granted.

No. 80–1925. UNITED TRANSPORTATION UNION *v.* LONG ISLAND RAILROAD CO. ET AL. C. A. 2d Cir. [Certiorari granted, 452 U. S. 960.] Motion of National Institute of Municipal Law Officers for leave to file a brief as *amicus curiae* granted.

No. 81–547. DIAZ ET AL. *v.* BEYER ET UX. Ct. Civ. App. Tex., 10th Sup. Jud. Dist. Motion of petitioners to strike portions of respondents' brief in opposition denied.

No. 81–531. IN RE PHONETELE, INC. Petition for writ of mandamus denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

Probable Jurisdiction Noted

No. 81–150. NORTHERN PIPELINE CONSTRUCTION CO. *v.* MARATHON PIPE LINE CO. ET AL.; and

No. 81–546. UNITED STATES *v.* MARATHON PIPE LINE CO. ET AL. Appeals from D. C. Minn. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 12 B. R. 946.

No. 81–349. CHICAGO BRIDGE & IRON CO. *v.* CATERPILLAR TRACTOR CO. ET AL. Appeal from Sup. Ct. Ill. Motion of Frank M. Keesling for leave to file a brief as *amicus curiae* granted. Probable jurisdiction noted and case set for oral argument in tandem with No. 80–1745, *F. W. Woolworth Co.* v. *Taxation and Revenue Department of New Mexico* [probable jurisdiction noted, *ante*, p. 812], and No. 80–2015, *ASARCO Inc.* v. *Idaho State Tax Commission* [probable jurisdiction noted, *ante*, p. 812]. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this case. Reported below: 84 Ill. 2d 102, 417 N. E. 2d 1343.

Certiorari Granted

No. 80–2116. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted.* Reported below: 639 F. 2d 1311.

No. 81–535. UNITED STATES DEPARTMENT OF STATE ET AL. *v.* WASHINGTON POST CO. C. A. D. C. Cir. Certiorari granted. Reported below: 207 U. S. App. D. C. 372, 647 F. 2d 197.

No. 81–202. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* CLAIBORNE HARDWARE CO. ET AL. Sup. Ct. Miss. Certiorari granted and case set for oral argument in tandem with No. 81–280, *General Building Contractors Assn., Inc.* v. *Pennsylvania et al.* [certiorari granted, *ante*, p. 939], and related cases. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 393 So. 2d 1290.

No. 81–300. FORD MOTOR CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 4th Cir. Certiorari granted. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 645 F. 2d 183.

Certiorari Denied. (See also Nos. 81–477, 81–5422, and 81–533, *supra*.)

No. 80–1770. TURLINGTON, COMMISSIONER OF EDUCATION OF FLORIDA, ET AL. *v.* S–1, A MINOR, BY P–1, ET AL.; and

No. 80–1791. EDWARDS, SUPERINTENDENT OF SCHOOLS, HENDRY COUNTY, FLORIDA, ET AL. *v.* S–1, A MINOR, BY P–1, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 635 F. 2d 342.

No. 80–1953. DOSTER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 276 S. C. 647, 284 S. E. 2d 218.

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*[REPORTER'S NOTE: For amendment of this order, see *post*, p. 1096.]

No. 80–1903. WHITTAKER *v.* WHITTAKER CORP. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 516.

No. 80–6787. KLOBUCHIR *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 966.

No. 80–6846. CRUMB *v.* UNITED STATES; and
No. 81–5130. CRUMB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 649 F. 2d 869.

No. 80–6942. DIRR *v.* DIRR. Sup. Ct. Miss. Certiorari denied. Reported below: 394 So. 2d 1366.

No. 81–130. WESTERN MINING COUNCIL ET AL. *v.* WATT, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 643 F. 2d 618.

No. 81–171. OESTERLEN SERVICES FOR YOUTH, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 649 F. 2d 399.

No. 81–177. AMERICAN SMELTING & REFINING CO. ET AL. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL.; and FEDERATED METALS CORP. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 648 F. 2d 863 (first case); 648 F. 2d 856 (second case).

No. 81–204. ROBERTS *v.* UNITED STATES;
No. 81–217. MORGAN *v.* UNITED STATES; and
No. 81–274. ZAVALA-PIZANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 174.

No. 81–305. BRINK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 648 F. 2d 1140.

No. 81–322. FIRST NATIONAL BANK OF SCOTIA ET AL. *v.* UNITED STATES DEPARTMENT OF THE TREASURY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1059.

No. 81–329. SWANSBORO COUNTRY, INC. *v.* LUMBERMAN'S MORTGAGE CO. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 171.

No. 81–378. WARINO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 935.

No. 81–381. RAMOCO INC. ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 649 F. 2d 814.

No. 81–464. VON MINDEN *v.* NUWES, DEPARTMENT OF THE NAVY. C. A. 9th Cir. Certiorari denied.

No. 81–468. MISSOURI EX REL. MISSOURI PUBLIC SERVICE CO. *v.* FRAAS, CHAIRMAN, PUBLIC SERVICE COMMISSION OF MISSOURI, ET AL. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 615 S. W. 2d 587.

No. 81–487. THOMAS *v.* SCHWARTZ. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1090.

No. 81–489. RUSSO *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 81–492. PAYNE *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 648 F. 2d 361.

No. 81–494. CAHALAN *v.* WALKER, PERSONAL REPRESENTATIVE OF ESTATE OF WALKER. Sup. Ct. Mich. Certiorari denied. Reported below: 411 Mich. 857, 306 N. W. 2d 99.

No. 81–511. BRADLEY *v.* BRION CORPORATION OF NASHVILLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 164.

No. 81–515. CITY OF EASTLAKE ET AL. *v.* OHIO BOARD OF BUILDING STANDARDS ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 66 Ohio St. 2d 363, 422 N. E. 2d 598.

No. 81–538. WELLS *v.* BROWN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 1117.

No. 81–539. CALIFORNIA ET AL. *v.* TUTTLE ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 120 Cal. App. 3d 320, 174 Cal. Rptr. 576.

No. 81–544. SILVERTON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 172.

No. 81–553. GORDON *v.* HEIMANN, UNITED STATES COMPTROLLER OF THE CURRENCY, ET AL.; GORDON *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL.; and GORDON *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 70.

No. 81–558. MELLON *v.* JOHN F. BEASLEY CONSTRUCTION CO. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 924.

No. 81–562. SOSO LIANG LO *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 657 F. 2d 263.

No. 81–563. HOLIDAY RAMBLER CORP. *v.* NORCOM DIVISION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1059.

No. 81–567. COMMISSION HOUSE DRIVERS UNION LOCAL NO. 400 ET AL. *v.* SWACKARD. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 712.

No. 81–576. JACOBS *v.* COLLEGE OF WILLIAM AND MARY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 922.

No. 81–597. POE *v.* SUPREME COURT OF THE UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 171.

No. 81–632. MORETTO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 657 F. 2d 260.

No. 81–636. READ *v.* HELMS, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION. C. A. D. C. Cir. Certiorari denied. Reported below: 213 U. S. App. D. C. 32, 661 F. 2d 253.

No. 81–661. SHERER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 653 F. 2d 334.

No. 81–663. DENNIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 517.

No. 81–671. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 66.

No. 81–687. SWAREK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 656 F. 2d 331.

No. 81–690. CERRELLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 650 F. 2d 606.

No. 81–698. CURCIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 663 F. 2d 1069.

No. 81–5002. ALLEN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 81–5287. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 967.

No. 81–5288. DURLING ET AL. *v.* O'BRIEN ET AL. C. A. 1st Cir. Certiorari denied.

No. 81–5402. HUGHES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–5403. LITTERELL *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–5409. BARRETT *v.* NORTH CAROLINA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied.

No. 81–5410. BEHAR *v.* SOUTHEAST BANK TRUST CO., N. A., PERSONAL REPRESENTATIVE OF THE ESTATE OF BEHAR. Sup. Ct. Fla. Certiorari denied. Reported below: 402 So. 2d 607.

No. 81–5411. MITCHELL *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 1116.

No. 81–5412. MCDONALD *v.* VANDERPOOL ET AL. C. A. 6th Cir. Certiorari denied.

No. 81–5415. STEPHENS *v.* ZANT, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 631 F. 2d 397 and 648 F. 2d 446.

No. 81–5416. STRIBLING *v.* DEROBERTIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–5417. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 81–5418. PAPP *v.* JAGO. C. A. 6th Cir. Certiorari denied. Reported below: 656 F. 2d 221.

No. 81–5421. WILSON *v.* LEFEVRE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 912.

No. 81–5423. BEYAH, AKA COLLINS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 81–5424. SWEET *v.* SMITH. C. A. 2d Cir. Certiorari denied.

No. 81–5428. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 81–5432. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5436. ROGERS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 81–5439. HILL *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 653 F. 2d 202.

No. 81–5443. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5444. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5447. FOX *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–5448. JACKSON *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 677 F. 2d 371.

No. 81–5451. MAGEE *v.* DEUKMEJIAN, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 81–5452. TANNER *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 667 F. 2d 1023.

No. 81–5456. HERRON *v.* PENDLETON, SABIAN & CRAFT ET AL. Sup. Ct. Colo. Certiorari denied.

No. 81–5530. HEIMERLE *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 1119.

No. 81–5535. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 657 F. 2d 1249.

No. 81–5542. THOMAS *v.* STRICKLAND, SUPERINTENDENT, LORTON REFORMATORY. Ct. App. D. C. Certiorari denied.

No. 81–5543. PYLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 655 F. 2d 1130.

No. 81–5546. GADDIS *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Sup. Ct. Ga. Certiorari denied. Reported below: 247 Ga. 717, 279 S. E. 2d 219.

No. 81–5548. SHANMUGADHASAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 293.

No. 81–5552. HOLT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1090.

No. 81–5554. HAMMONDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 81–5556. BURROUGHS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 650 F. 2d 595.

No. 81–5558. DOEPEL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 434 A. 2d 449.

No. 81–5561. LEGENDRE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 657 F. 2d 238.

No. 81–5565. LAWSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 678.

No. 81–5580. RIBEIRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 663 F. 2d 1069.

No. 81–5587. GREER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 80–6785. SPAZIANO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 393 So. 2d 1119.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, joins, dissenting.

Because I continue to believe that the death penalty is in all circumstances cruel and unusual punishment prohibited by

the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant certiorari and vacate the death sentence in this case. I would also grant certiorari on an additional ground. This case presents the question whether the death sentence may be imposed after conviction of a capital offense, where the jury was not instructed as to lesser-included noncapital offenses because the statute of limitations had run with respect to the lesser offenses. Petitioner argues that the failure to provide instructions on lesser-included offenses in these circumstances is inconsistent with this Court's decisions in *Keeble* v. *United States*, 412 U. S. 205 (1973), and *Beck* v. *Alabama*, 447 U. S. 625 (1980). In my view, there is substantial merit to this claim.

Petitioner was arrested by Florida police and charged with the capital felony of first-degree murder. He was tried by a jury. After the submission of the evidence, the trial judge required petitioner to choose between having the jury instructed only as to first-degree murder, or waiving the Florida statute of limitations with respect to the lesser-included noncapital offenses of second-degree murder, third-degree murder, and manslaughter. The statute had run on each of those offenses. Petitioner refused to waive the statute of limitations. Thus, the jury was not permitted to consider the possibility that petitioner might be guilty of some lesser offense. After several hours of deliberations, the jury found petitioner guilty of first-degree murder. It recommended that he be sentenced to life imprisonment. The trial judge rejected this recommendation and sentenced petitioner to death. The Florida Supreme Court affirmed. It stated that instructions as to lesser-included offenses would have been required in ordinary circumstances. Where the statute had run on those offenses, however, instructions were not necessary. 393 So. 2d 1119 (1981).

I am not persuaded by the Florida Supreme Court's reasoning. In *Keeble* and *Beck*, this Court emphasized the importance of instructions on lesser-included offenses. *Keeble*

held that an Indian prosecuted in a Federal District Court under the Major Crimes Act of 1855 is entitled to a jury instruction on a lesser-included offense, even though the Act did not confer federal jurisdiction over the defendant for the lesser crime. The Court stated:

> "[I]f the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." *Keeble*, *supra*, at 212–213.

The Court did not explicitly hold that there was a due process right to have the jury instructed on a lesser offense. It stated, however, that if the Major Crimes Act were interpreted as precluding such an instruction, "difficult constitutional questions" would be raised. *Id.*, at 213.

In *Beck* v. *Alabama*, the Court held that the death sentence may not constitutionally be imposed where the jury was not permitted to consider a verdict of guilt of a lesser-included offense. Providing the jury with the option of convicting on a lesser-included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard. As in *Keeble*, the Court chose not to decide whether due process requires that instructions on lesser offenses be given in every case. It stated, however, that the risk of an unwarranted conviction cannot be tolerated in a case in which the defendant's life is at stake.

The principles underlying *Keeble* and *Beck* would seem to apply with just as much force where the statute of limitations on the lesser-included offenses has run. Those cases focused

on the danger of an unwarranted conviction, where the jury was given a choice only between acquittal and conviction for the offense charged, and was not given the opportunity to consider whether the defendant was guilty of some lesser-included offense. This danger exists even where the statute of limitations has run with respect to the lesser offense. Thus, I think a strong argument can be made that the jury should be instructed as to that offense.

A criminal defendant should not be penalized because the State did not bring him to trial within the time prescribed by the state legislature for lesser-included offenses. After receiving instructions on both the offense charged and the lesser-included offenses, the jury may render a guilty verdict on a lesser offense. Such a verdict would reflect the jury's conclusion that, although it believed beyond a reasonable doubt that the defendant was guilty of criminal conduct, it had a reasonable doubt as to whether the State had proved each element of the offense charged. At this point, the court must decide as a matter of law whether the statute of limitation prevents it from sentencing the petitioner for the lesser crime. The court should not be permitted to avoid this legal question by refusing to allow the jury to decide whether the defendant is guilty only of a lesser offense.

The issue presented here is very similar to the issue presented in a petition for a writ of certiorari considered by this Court last Term. See *Holloway* v. *Florida*, 449 U. S. 905 (1980). In that case also, the petitioner was arrested by Florida police and charged with first-degree murder. The trial court chose not to instruct the jury on lesser-included offenses on the grounds that the Florida statute of limitations had run with respect to those offenses. The jury was instructed solely as to first-degree murder. Petitioner was convicted and sentenced to life imprisonment. The Florida Supreme Court affirmed and this Court denied certiorari. JUSTICE BLACKMUN, joined by JUSTICE BRENNAN and myself, dissented. JUSTICE BLACKMUN explained as follows:

> "The Court's decisions in both *Keeble* and *Beck* imply that affording jurors a less drastic alternative may be constitutionally necessary to enhance or preserve their essential factfinding function. Whether the trial court properly may enter a judgment of guilt should the jury convict for a lesser included offense seems to me a separate, *legal* matter with which the factfinder need have no concern." *Id.*, at 908 (footnote omitted).

In at least one respect, this case is more troubling than *Holloway*. The petitioner here has been sentenced to death. Because the court refused to instruct the jury on the lesser offenses solely because the statute of limitations had run with respect to those offenses, its decision to impose the death penalty was flatly inconsistent with *Beck* v. *Alabama*.

JUSTICE BLACKMUN, dissenting.

Because of the presence in this case of the issue concerning petitioner's entitlement to instructions on lesser-included noncapital offenses, I would grant the petition for certiorari and give the case plenary consideration. See *Holloway* v. *Florida*, 449 U. S. 905 (1980) (dissenting opinion).

No. 80–6819. MCCRAY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 395 So. 2d 1145.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

As I have consistently stated, I believe that a decision to impose the death penalty is always cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976). Thus, I would grant certiorari in this case and vacate the judgment

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insofar as it leaves undisturbed the death sentence. I would also grant certiorari on an additional ground. Petitioner argues that the death penalty has been arbitrarily and capriciously imposed in this case, because the trial judge rejected the jury's recommendation that he be sentenced to life imprisonment. According to petitioner, the jury should not have been overruled, since its recommendation was not unreasonable. In my view, there is substantial merit to this claim.

I

The Florida capital punishment statute, Fla. Stat. § 921.141 (1979), which this Court approved in *Proffitt* v. *Florida*, 428 U. S. 242 (1976), establishes a three-level review system. After a defendant is found guilty of a capital offense, an evidentiary hearing is held before the judge and the jury to determine the sentence. At the conclusion of the hearing, the jury considers whether "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist," and based on these considerations, "whether the defendant should be sentenced to life imprisonment or death." §§ 921.141(2)(b) and (c).

The jury's verdict is advisory only; the actual sentence is imposed by the trial judge after he conducts his own review of the aggravating and mitigating circumstances. However, the Florida Supreme Court has stated that the jury recommendation is entitled to substantial weight. "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder* v. *State*, 322 So. 2d 908, 910 (1975). Accord, *Thompson* v. *State*, 328 So. 2d 1, 5 (Fla. 1976). See also *Proffitt* v. *Florida*, *supra*. Judges are given the power to override jury verdicts only because of the possibility that in isolated cases juries will unreasonably reject death. See *Chambers* v. *State*, 339 So. 2d 204, 208–209 (Fla. 1976).

The statute provides for automatic review by the Florida Supreme Court of all cases in which a death penalty has been imposed. § 921.141(4). The statute itself does not require any specific form of review. The court has stated, however, that its function is to ensure that similar results are reached in similar cases. "If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." *State* v. *Dixon*, 283 So. 2d 1, 10 (1973).

If Florida is to use a system of advisory verdicts, it must administer that system with scrupulous fairness. Having stated that it will reject only those recommendations that are unreasonable, it must conscientiously adhere to that standard. The trial judge or the Florida Supreme Court may not allow a reasonable jury recommendation to stand in some cases, and substitute their own judgment in others. Where matters of life and death are concerned, such a lack of predictability cannot be tolerated. This Court has repeatedly emphasized the importance of consistency in capital cases. See, *e. g.*, *Gardner* v. *Florida*, 430 U. S. 349, 357–358 (1977); *Woodson* v. *North Carolina*, 428 U. S. 280, 302–303 (1976); *Jurek* v. *Texas*, 428 U. S. 262, 274 (1976); *Proffitt* v. *Florida*, *supra*, at 259–260; *Gregg* v. *Georgia*, *supra*, at 188–189; *Furman* v. *Georgia*, 408 U. S. 238, 309–310 (1972).

II

My review of the record in this case leads me to believe that the trial judge may have improperly substituted his own judgment for that of the jury in deciding to impose the death penalty. Petitioner was tried for the murder of a 67-year-old woman. After the close of the evidence, the jury returned a verdict of guilty, but recommended a life sentence. The trial judge rejected this recommendation and entered a judgment calling for the death sentence. He found three statutory aggravating circumstances. First, because peti-

tioner had recently pleaded guilty to an unrelated assault charge, he was a convicted felon. See Fla. Stat. § 921.141(5)(b) (1979). Second, the murder was "especially heinous, atrocious, or cruel." § 921.141(5)(h). Third, the murder took place during the commission of a rape. § 921.141(5)(d). The trial judge stated that these aggravating circumstances outweighed any mitigating circumstances. He rejected evidence submitted by petitioner to show that at the time of the crime he was "under the influence of extreme mental or emotional disturbance," a statutory mitigating circumstance. § 921.141(6)(b).

The Florida Supreme Court affirmed the trial judge's decision to override the jury's advisory verdict. *McCrae (sic)* v. *State*, 395 So. 2d 1145 (1980). It agreed that the guilty plea to the unrelated felony charge could be treated as a felony conviction, and thus constituted an aggravating circumstance under the death penalty statute. It also agreed that the crime was especially heinous, atrocious, or cruel, and that it had taken place during the commission of a rape. The Supreme Court reasoned that the jury must have decided to recommend life imprisonment because it believed that petitioner was under the influence of extreme mental or emotional disturbance at the time the crimes were committed. Like the trial judge, however, the State Supreme Court concluded that the evidence submitted by petitioner could not support a conclusion that this mitigating circumstance actually existed.

I am extremely troubled by the trial judge's decision to override the jury's advisory verdict, and by the Florida Supreme Court's affirmance of that decision. A reasonable jury unquestionably could have concluded that the mitigating circumstances outweighed the aggravating circumstances. Petitioner offered substantial evidence in support of his claim that he acted under the influence of extreme mental or emotional disturbance. A psychiatrist, Dr. Clarence Schlit, tes-

tified that petitioner was subject to attacks when under emotional stress that prevented him from exercising a normal degree of restraint. He further stated that although petitioner was not insane, he suffered from a chronic schizophrenic illness. Dr. Schlit's testimony was confirmed by two court-appointed psychiatrists who examined petitioner to determine whether he was competent to stand trial. Dr. Mordecai Haber observed that petitioner suffered from a disorder that contributed to an explosive personality. He concluded that although petitioner was competent, he was too dangerous to be at liberty. Dr. Thomas Haagland found that although petitioner had control of himself while sober, he released "an underlying epileptic furor" whenever he was intoxicated. 395 So. 2d, at 1147–1148.

Other evidence in the record lends support to petitioner's claim that he was emotionally disturbed at the time of the murder. Petitioner was confined in a psychiatric ward while in the United States Army. Record 883. Prior to trial he made at least three suicide attempts. *Id.*, at 883, 884, 1005. He frequently hears voices, and regards this as normal. *Id.*, at 1006. He suffers from "organic brain syndrome with epilepsy." *Id.*, at 1022. These findings were confirmed by an electroencephalogram. *Ibid.*

The trial judge and the Florida Supreme Court unfairly discounted this evidence. They both emphasized that Dr. Schlit was unwilling to testify that it was a "medical certainty" that petitioner acted under the influence of extreme mental disturbance. See 395 So. 2d, at 1148. This does not mean, however, that it was unreasonable for the jury to conclude, on the basis of all the evidence, that petitioner was emotionally disturbed at the time of the murder.

I also think it quite possible that the jury was not convinced that this was an "especially heinous, atrocious, or cruel" murder within the meaning of the death penalty statute. It is true that there was evidence suggesting that the

victim was beaten before she died. However, it was not possible to determine how quickly the victim died, or how much she suffered. A reasonable jury could have found that the murder was not heinous. The Florida Supreme Court has stated that the "heinous, atrocious, or cruel" standard applies only to those murders that are "extremely wicked" and "shockingly evil," or "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." *State* v. *Dixon*, 283 So. 2d, at 9.

Since a jury could reasonably have concluded that the mitigating circumstances outweighed the aggravating circumstances, the trial judge improperly rejected its recommendation. He substituted his own judgment concerning the proper sentence, in disregard of the standards set forth by the Florida Supreme Court. Under the circumstances, the imposition of the death sentence was arbitrary and capricious.

No. 81–14. PERAINO ET AL. *v.* UNITED STATES; and

No. 81–416. BATTISTA ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petitions and reverse the convictions. Reported below: 646 F. 2d 237.

No. 81–97. A. O. SMITH CORP. *v.* NOTTELSON ET AL.; and

No. 81–323. SMITH STEEL WORKERS D.A.L.U. 19806, AFL–CIO *v.* NOTTELSON ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 643 F. 2d 445.

No. 81–501. BONTRAGER, JUDGE, ELKHART SUPERIOR COURT NO. 2 *v.* SUPREME COURT OF INDIANA ET AL. Sup. Ct. Ind. Motion of California Attorneys for Criminal Justice et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: —— Ind. ——, 418 N. E. 2d 530.

No. 81–336. CONSOLIDATED RAIL CORP. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 207 U. S. App. D. C. 307, 646 F. 2d 642.

No. 81–559. BLUEMLE *v.* N. K. PARRISH, INC. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 638 F. 2d 1366.

No. 81–5035. TRUITT *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied. Reported below: 1 Ohio App. 3d 65, 439 N. E. 2d 452.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Several uniformed police officers approached petitioner after he was observed selling drugs on the street. Petitioner fled, discarding a paper bag he had been carrying. After a brief chase, petitioner was apprehended and the paper bag was retrieved. The bag contained Talwin, a controlled substance under Ohio law, and the drug which had been the subject of the earlier exchange. Petitioner was charged with possession of a controlled substance, a misdemeanor; drug trafficking (sale of a controlled substance), a felony; and a misdemeanor assault on the arresting officer.

Petitioner was tried and convicted on the misdemeanor charges, and sentenced to 60 days for the possession offense, and 10 days for the assault. Petitioner was then indicted on the charge of drug trafficking. Before trial he moved to dismiss, claiming former jeopardy by virtue of his prior conviction for possession. The trial court granted the motion and dismissed the indictment. The State appealed and the Court of Appeals for the First Appellate District of Ohio reversed. Noting that "the drugs possessed by the defendant were not the drugs that he sold," and that the state legislature "has not chosen to make a crime of dealing in (pushing) drugs as a con-

tinuing course of conduct, but to proscribe a series of acts committed while dealing in drugs with a separate punishment for each," 1 Ohio App. 3d 65, 66–67, 439 N. E. 2d 452, 454 (1981), the court perceived no double jeopardy barrier to the second prosecution. The Ohio Supreme Court denied petitioner leave to appeal.

I would grant the petition for certiorari and reverse the judgment of the Court of Appeals. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires that, except in extremely limited circumstances, not present here, "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction" be prosecuted in a single proceeding. *Ashe* v. *Swenson*, 397 U. S. 436, 453–454, and n. 7 (1970) (BRENNAN, J., concurring). See *Thompson* v. *Oklahoma*, 429 U. S. 1053 (1977) (BRENNAN, J., dissenting), and cases collected therein. Although the legislature may be free to divide a continuing course of conduct into a number of discrete crimes, each distinctly punishable, in my view the State was not free to subject petitioner to successive trials on charges growing out of this one criminal transaction.

No. 81–5425. PIERCE *v.* VOLKSWAGEN OF AMERICA, INC. Sup. Ct. Ind. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

Rehearing Denied

No. 80–6757. MCCOLPIN *v.* ATKINS, *ante*, p. 911. Petition for rehearing denied.

No. 80–2166. TABEROFF *v.* FARMERS GROUP, INC., ET AL., *ante*, p. 836;

No. 80–6544. JOHNSON *v.* LOUISIANA, *ante*, p. 840;

No. 80–6826. IN RE MCKNIGHT, *ante*, p. 811; and

No. 80–6862. ROYSE *v.* WASHINGTON ET AL., *ante*, p. 853. Petitions for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

No. 80–6901. WOODS *v.* NEAL ET AL., *ante*, p. 855;

No. 81–5033. MCMILLION *v.* MARYLAND, *ante*, p. 869;

No. 81–5078. BURNSIDE *v.* WYRICK, WARDEN, *ante*, p. 870;

No. 81–5163. MERCER *v.* WASHINGTON ET AL., *ante*, p. 873; and

No. 81–5289. NOE *v.* UNITED STATES, *ante*, p. 876. Petitions for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

NOVEMBER 12, 1981

Dismissal Under Rule 53

No. 81–463. BROWN, WARDEN *v.* VARGAS. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 53.

NOVEMBER 16, 1981

Appeals Dismissed

No. 81–68. FORET *v.* UNITED GAS PIPELINE CO., INC. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 634 F. 2d 629.

No. 81–561. GAY ET AL. *v.* EIGHTH JUDICIAL DISTRICT COURT OF NEVADA ET AL. Appeal from Sup. Ct. Nev. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 97 Nev. 332, 629 P. 2d 1209.

No. 81–5164. STRICKLAND *v.* BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 81–616. GEDEON *v.* GEDEON, AKA ROSE. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. Reported below: 630 P. 2d 579.

Certiorari Granted—Vacated and Remanded

No. 81–134. POWELL *v.* POWELL. Ct. App. Cal., 3d App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McCarty* v. *McCarty*, 453 U. S. 210 (1981).

Certiorari Granted—Reversed. (See No. 80–2077, *ante*, p. 83.)

Miscellaneous Orders

No. A–362. KENTUCKY ASSOCIATION FOR RETARDED CITIZENS, INC., ET AL. *v.* CONN, SECRETARY, KENTUCKY DEPARTMENT FOR HUMAN RESOURCES, ET AL. Application for stay of the order of the United States Court of Appeals for the Sixth Circuit, case No. 80–3560, entered October 8, 1981, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

No. A–392. CANTRELL ET AL. *v.* FLORIDA. Sup. Ct. Fla. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–414. COLEMAN *v.* MONTANA. Application for stay of execution and enforcement of the sentence of death, addressed to JUSTICE MARSHALL and referred to the Court, denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS would grant the application. JUSTICE POWELL took no part in the consideration or decision of this application.

No. 80–1640. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* SHOLLY ET AL.; and

No. 80–1656. METROPOLITAN EDISON CO. ET AL. *v.* PEOPLE AGAINST NUCLEAR ENERGY ET AL. C. A. D. C. Cir. [Certiorari granted, 451 U. S. 1016.] Motion of petitioners to defer oral argument granted.

No. 80–1436. BALDRIGE, SECRETARY OF COMMERCE, ET AL. *v.* SHAPIRO, ESSEX COUNTY EXECUTIVE. C. A. 3d Cir. [Certiorari granted, 451 U. S. 936]; and

No. 80–1781. MCNICHOLS, MAYOR OF DENVER, ET AL. *v.* BALDRIGE, SECRETARY OF COMMERCE, ET AL. C. A. 10th Cir. [Certiorari granted, 452 U. S. 937.] Motion of petitioners in No. 80–1781 to divide oral argument with respondent in No. 80–1436 granted.

No. 80–1924. WEINBERGER, SECRETARY OF DEFENSE, ET AL. *v.* ROSSI ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 813.] Motion of the parties to dispense with printing the joint appendix granted.

No. 80–2209. UNITED STATES *v.* ROSS. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 891.] Motion of the parties to dispense with printing the joint appendix granted.

No. 81–213. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* HOGAN ET AL. D. C. Mass. [Probable jurisdiction noted, *ante*, p. 891.] Motion for appointment of counsel granted, and it is ordered that William H. Simon, Esquire, of Stanford, Cal., be appointed to serve as counsel for appellees in this case.

No. 81–5613. IN RE BOYDEN. C. A. 9th Cir. Petition for common-law writ of certiorari denied. Reported below: 631 F. 2d 120.

No. 81–595. IN RE BASKETT ET AL.; and

No. 81–5458. IN RE RUCKER. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 81–611. GLOBE NEWSPAPER CO. *v.* SUPERIOR COURT FOR THE COUNTY OF NORFOLK. Appeal from Sup. Jud. Ct. Mass. Probable jurisdiction noted. Reported below: 383 Mass. 838, 423 N. E. 2d 773.

Certiorari Granted

No. 81–614. GRIFFIN *v.* OCEANIC CONTRACTORS, INC. C. A. 5th Cir. Certiorari granted. Reported below: 664 F. 2d 36.

No. 81–622. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* COMMERCIAL METALS CO. C. A. 5th Cir. Certiorari granted. Reported below: 641 F. 2d 235.

No. 81–55. NEW YORK *v.* FERBER. Ct. App. N. Y. Motion of Covenant House for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 52 N. Y. 2d 674, 422 N. E. 2d 523.

No. 81–389. UNION LABOR LIFE INSURANCE CO. *v.* PIRENO; and

No. 81–390. NEW YORK STATE CHIROPRACTIC ASSN. *v.* PIRENO. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 650 F. 2d 387.

Certiorari Denied. (See also Nos. 81–68, 81–561, 81–5164, and 81–5613, *supra.*)

No. 80–6825. WRIGHT *v.* AUSTON ET AL. C. A. 5th Cir. Certiorari denied.

No. 81–43. ODOM *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 303 N. C. 163, 277 S. E. 2d 352.

No. 81–72. CANNON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 383 So. 2d 389 and 395 So. 2d 1367.

No. 81–142. STANKOWSKI *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 184 Conn. 121, 439 A. 2d 918.

No. 81–238. TONG WOOK MOON *v.* OHIO. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 81–235. PUGET SOUND POWER & LIGHT CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 644 F. 2d 785.

No. 81–289. CROWN SIMPSON PULP CO. ET AL. *v.* GORSUCH, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 323.

No. 81–359. YUEN *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 649 F. 2d 163.

No. 81–405. WOLFE, EXECUTRIX, ET AL. *v.* CONTINENTAL CASUALTY CO. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 705.

No. 81–435. HOLIDAY INN *v.* HOLIDAY INNS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 645 F. 2d 239.

No. 81–458. NATIONAL BANK OF COMMERCE OF SAN ANTONIO *v.* SECRETARY OF LABOR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 474.

No. 81–508. GOLDBERG *v.* MEDTRONIC, INC. C. A. 7th Cir. Certiorari denied. Reported below: 654 F. 2d 727.

No. 81–519. KEETER ET AL. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 222 Va. 134, 278 S. E. 2d 841.

No. 81–526. JONES *v.* PRUDENTIAL INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 650 F. 2d 281.

No. 81–529. ANGEL ET AL. *v.* SUPERIOR COURT OF SAN DIEGO COUNTY ET AL. (RENN ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81–550. BUTTRESS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81–552. TIRU-CHELVAM *v.* VETERANS' ADMINISTRATION HOSPITAL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 1211.

No. 81–560. DORNIER, A. G., ET AL. *v.* SWEANEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERTS, ET AL. Super. Ct. Alaska, 4th Jud. Dist. Certiorari denied.

No. 81–571. CLARK *v.* PAYNE. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 1117.

No. 81–577. CITIZENS COMMITTEE TO SAVE HISTORIC RHODES TAVERN *v.* DISTRICT OF COLUMBIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT ET AL. Ct. App. D. C. Certiorari denied. Reported below: 432 A. 2d 710.

No. 81–578. OGLE *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 46 Ore. App. 109, 610 P. 2d 1242.

No. 81–579. CONCORD INSTRUMENTS CORP. *v.* PENSION BENEFIT GUARANTY CORPORATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 701.

No. 81–580. COLGATE-PALMOLIVE CO. *v.* UNITED ROASTERS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 649 F. 2d 985.

No. 81–581. BEATTY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 1213.

No. 81–582. CIRCLE A & W PRODUCTS CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 924.

No. 81–588. KINKEAD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 494 Pa. 321, 431 A. 2d 280.

No. 81–592. MUELLER ET AL. *v.* RUDDY ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 617 S. W. 2d 466.

No. 81–602. MOLINS MACHINE CO., INC. *v.* RENGO CO. LTD. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 657 F. 2d 535.

No. 81–606. DAVIS & COX ET AL. *v.* EIGHTH JUDICIAL DISTRICT COURT OF NEVADA ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 97 Nev. 332, 629 P. 2d 1209.

No. 81–612. MASINO ET AL. *v.* OUTBOARD MARINE CORP. ET AL.; and BUBELLO, ADMINISTRATRIX *v.* TAYLOR ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 652 F. 2d 330 (first case); 659 F. 2d 1065 (second case).

No. 81–627. ASHLAND-WARREN, INC. *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 248 Ga. 1, 281 S. E. 2d 151.

No. 81–628. OLPIN, A MINOR, BY HER GUARDIAN AD LITEM, LOUDEN *v.* OLPIN. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 118 Cal. App. 3d 565, 173 Cal. Rptr. 447.

No. 81–643. THORDARSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 646 F. 2d 1323.

No. 81–684. AU *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 61.

No. 81–695. BLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 653 F. 2d 989.

No. 81–706. PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 648 F. 2d 219.

No. 81–709. PICKETTS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 655 F. 2d 837.

No. 81–725. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 649 F. 2d 368.

No. 81–727. JOHNSTON *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied.

No. 81–732. WALTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 732.

No. 81–737. MCFILLIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: —— F. 2d ——.

No. 81–5032. BARKSDALE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 639 F. 2d 1115.

No. 81–5050. ANTONELLI *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 81–5068. HENSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 641 F. 2d 250.

No. 81–5075. URDY *v.* TEXAS ET AL. Ct. Crim. App. Tex. Certiorari denied.

No. 81–5080. ROBINSON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 389 So. 2d 1067.

No. 81–5125. JETER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 934.

No. 81–5140. MAXIE ET AL. *v.* HEY, JUDGE. Sup. Ct. App. W. Va. Certiorari denied.

No. 81–5175. CUTHBERTSON ET AL. *v.* CBS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 651 F. 2d 189.

No. 81–5174. ROOKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 81–5251. MINOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 934.

No. 81–5254. JACKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 244.

No. 81–5309. EDWARDS *v.* GARRISON. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 489.

No. 81–5310. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 640 F. 2d 614.

No. 81–5442. VETETO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 2d 722.

No. 81–5453. BUCHANAN *v.* SOWDERS, SUPERINTENDENT, KENTUCKY STATE PENITENTIARY. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 932.

No. 81–5457. PADILLA *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 402 So. 2d 1378.

No. 81–5459. WILDER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 401 So. 2d 151.

No. 81–5463. PEREA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–5464. LEPAGE *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 102 Idaho 387, 630 P. 2d 674.

No. 81–5465. LEE *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 633 P. 2d 48.

No. 81–5469. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied.

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No. 81–5466. BOZEMAN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 401 So. 2d 167.

No. 81–5470. WOODS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 81–5471. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5472. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5476. OWENS *v.* THORNBURGH. C. A. 3d Cir. Certiorari denied.

No. 81–5479. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5480. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5481. OUTLAW *v.* LANE. C. A. 7th Cir. Certiorari denied.

No. 81–5482. WHITE *v.* WYRICK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 651 F. 2d 597.

No. 81–5484. ALDRIDGE *v.* ENGLE. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1025.

No. 81–5490. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5491. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5492. SWEENEY *v.* STRYJAK ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–5493. NAUM *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 630 P. 2d 785.

No. 81–5494. PINCHEFF *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 81–5495. VALDES *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied.

No. 81–5497. JACKSON *v.* COUSINS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 81–5500. CHRISTENSEN *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–5501. BREEST ET AL. *v.* PERRIN, WARDEN, NEW HAMPSHIRE STATE PRISON, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 655 F. 2d 1.

No. 81–5515. COLEMAN *v.* MARZULLI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 671 F. 2d 496.

No. 81–5559. LAWS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 663 F. 2d 1068.

No. 81–5577. HALL *v.* NEW YORK. Ct. Cl. N. Y. Certiorari denied.

No. 81–5581. MAGGARD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 399 So. 2d 973.

No. 81–5584. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1090.

No. 81–5588. DIAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–5589. TURNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–5601. POLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 884.

No. 81–5602. ROSAS-MONTES ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 293.

No. 81–5606. BROWN, AKA DENNIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 656 F. 2d 361.

No. 81–5610. GREEN *v.* BEAVER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1026.

No. 80–2005. WALSH *v.* FORD MOTOR CO. ET AL. Ct. App. Ohio, Lorain County. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 81–452. HOLTON, CHIEF INVESTIGATOR, SELECT COMMITTEE ON AGING, U. S. HOUSE OF REPRESENTATIVES, ET AL. *v.* BENFORD. C. A. 4th Cir. Motion of Thomas P. O'Neill, Jr., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 661 F. 2d 917.

No. 81–480. KAMBEROS *v.* GTE AUTOMATIC ELECTRIC, INC. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 598.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

In this Title VII case, the Court of Appeals for the Seventh Circuit substantially reduced an award of backpay because the petitioner did not seek a right-to-sue letter from the Equal Employment Opportunity Commission while the Commission was attempting to resolve the grievance through conciliation. The decision conflicts directly with the position of the Fifth Circuit, indirectly with that of the Ninth Circuit, possibly misreads this Court's decisions, and definitely leaves Title VII plaintiffs confused as to their responsibilities under the Civil Rights Act of 1964. I would grant certiorari to resolve the conflict and, it is hoped, to clarify the situation.

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U. S. C. §2000e *et seq.*, establishes procedures by which aggrieved parties may seek relief from unlawful discrimination. The Act provides that charges first be

brought to the Equal Employment Opportunity Commission within 180 days of the alleged violation. § 2000e–5(e). If the Commission dismisses the charge or issues a right-to-sue letter, the party may bring an action in federal court within 90 days. § 2000e–5(f)(1)(A). Regulations under the Act provide that after 180 days from the filing of a complaint with the Commission, a person can request a right-to-sue notice which "the Commission shall promptly issue." 29 CFR § 1601.28(a) (1980). Nothing in the Act or its accompanying regulations requires that such a request be made within a certain time, or, for that matter, that it be made at all.

The petitioner, a lawyer, was refused employment by respondent because, as she was told in just so many words, the company was looking for a man. That same day petitioner filed her complaint with the Commission. Although petitioner could have requested a right-to-sue letter 180 days later, she waited for over four years while the Commission pursued the grievance through conciliation. That process apparently was unsuccessful and, on January 3, 1974, a right-to-sue letter was issued. Fifteen days later, petitioner filed suit in Federal District Court, which upheld her claim and awarded various prospective relief as well as backpay of over $100,000 dating from the filing of charges in 1969. The Court of Appeals for the Seventh Circuit agreed that the respondent was liable for sex discrimination, but objected to the backpay award because the petitioner allowed her complaint to "lie dormant" with the Commission for over four years when she could have obtained a right-to-sue letter upon request. The District Court was directed, on remand, to reduce the backpay award for the time during which petitioner could have requested a right-to-sue letter from the Commission. 603 F. 2d 598, 603.

The Fifth Circuit has expressly declined to rule that Title VII plaintiffs must make a timely request for a right-to-sue letter or lose the right to substantial backpay relief. In two

recent cases, one involving a 9-year delay between the filing of charges and the issuance of a right-to-sue letter, *Bernard* v. *Gulf Oil Co.*, 596 F. 2d 1249 (1979), aff'd and modified on other grounds, 619 F. 2d 459 (1980) (en banc), aff'd, 452 U. S. 89 (1981), and the other involving a claim pending before the Commission for five years, *Fowler* v. *Blue Bell, Inc.*, 596 F. 2d 1276 (1979), the court reasoned that the plaintiff was entitled to await completion of conciliation efforts before filing suit. "A plaintiff cannot be penalized for choosing . . . the legislatively and judicially favored method of relying on the administrative processes of the EEOC." 596 F. 2d, at 1257. The Fifth Circuit refused to find cause to invoke laches* in the plaintiffs' failure to request a right-to-sue letter from the Commission.

In this case, the court did not refer to the Fifth Circuit cases, or any cases within its own Circuit, but looked instead to dictum in a Ninth Circuit decision that the "complainant should not be permitted to prejudice the employer by taking advantage of the Commission's slowness in processing claims or by procrastinating while being aware that the Commission intends to take no further action." *Lynn* v. *Western Gillette, Inc.*, 564 F. 2d 1282, 1287 (1977) (footnote omitted). Nothwithstanding this language, the decision in *Lynn* was that the statutory 90-day period within which an aggrieved party must file a Title VII action does not begin to run until receipt of a right-to-sue letter and notification that the Commission's conciliation efforts have failed.

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*The respondent suggests a meaningful distinction exists between the Fifth Circuit's refusal to invoke laches and the Seventh Circuit's reduction of backpay. The distinction is not persuasive, as the Seventh Circuit seems to recognize. See *EEOC* v. *Massey-Ferguson, Inc.*, 622 F. 2d 271, 275 (1980). Both doctrines are governed by the same equitable considerations. It would be little comfort to a Title VII plaintiff to know that a court will not bar a claim but only substantially limit the amount of recovery. The use of either would leave aggrieved parties confused as to whether they can await the Commission's action or must press for permission to file suit. The cases cannot be reconciled on this basis.

This Court has said that a trial court may restrict or even deny backpay *when* "a Title VII defendant is . . . prejudiced by a private plaintiff's unexcused conduct of a particular case." *Occidental Life Insurance Co.* v. *EEOC*, 432 U. S. 355, 373 (1977); *Albermarle Paper Co.* v. *Moody*, 422 U. S. 405, 424–425 (1975). Here, it is at least arguable that petitioner's patience in awaiting completion of conciliation efforts is not to be considered "unexcused conduct" in light of the "federal policy requiring employment discrimination claims to be . . . , whenever possible, administratively resolved before suit is brought in a federal court." 432 U. S., at 368. In authorizing the Commission to initiate its own suits, Congress hoped that "recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the [Commission]." 118 Cong. Rec. 7168 (1972). "It is assumed that individual complainants . . . would not cut short the administrative process merely to encounter the same kind of delays in a court proceeding." H. R. Rep. No. 92–238, p. 13 (1971).

The conflict between the Circuits is plain. It is also apparent that if a Title VII plaintiff should pay a price for awaiting the outcome of conciliation efforts, that result should be made unmistakably clear. I would grant certiorari.

No. 81–618. BLINZINGER, ADMINISTRATOR, DEPARTMENT OF PUBLIC WELFARE OF INDIANA *v.* BOND ET AL. C. A. 7th Cir. Motion of respondents Louise Bond et al. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 655 F. 2d 766.

No. 81–573. JOHNSON ET AL. *v.* AIRLINE PILOTS IN THE SERVICE OF NORTHWEST AIRLINES, INC., ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 650 F. 2d 133.

No. 81–517. SWITLIK ET AL. *v.* HARDWICKE CO., INC., ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 651 F. 2d 852.

No. 81–646. NOVACK INVESTMENT CO., DBA BUDIG WESTERN TRUCKING, ET AL. *v.* SETSER. C. A. 8th Cir. Certiorari denied. Reported below: 638 F. 2d 1137.

Opinion of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

In suggesting that the Court is derelict in its duty to resolve the apparent conflict between the decision of the Court of Appeals in this case and the decision of the Sixth Circuit in *Moore* v. *Sun Oil Co. of Pennsylvania*, 636 F. 2d 154 (1980), the dissenting opinion fails to mention the fact that both courts held that the issue of liability should be decided by a jury.* The question whether the arithmetical calculation of backpay should be made by a judge or by a jury under instructions from the judge is not nearly as significant as the question whether the determination of liability should be made by a judge or a jury. Moreover, since the employer in this case no longer offered employment of the type sought by petitioner, the backpay issue arose in a somewhat unusual context. I do not believe the Court has abused its discretion in declining to review this case.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

It may be unfortunate in light of the expanding size of our docket, but it remains the case that this Court is the only

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*In *Moore* the Court held:

"Since Moore's claim for legal relief and equitable relief are both based on alleged racial discrimination and since Moore was entitled to a jury trial with respect to his legal claims, he was entitled to have a jury determine liability (i.e. whether he had been a victim of racial discrimination). 9 Wright & Miller, *Fed. Prac. & Proc.* § 2306. If the jury so determined that here was liability, it would be for the court to determine whether Moore was entitled to back pay." 636 F. 2d, at 157.

body capable of resolving conflicts between the various lower courts, both federal and state. Our obligation to resolve these conflicts is just as pressing as is the need for a uniform rule of law. In my view this is a very pressing need, and is particularly so when the conflict involves those elements that define the character of the judicial process itself. In this respect, the right to a jury trial is fundamental. It is not a tolerable rule of law that one's right to a jury trial depends upon the geographical location of the federal district court within which one files a complaint. This is precisely what is involved in this case.

Respondent unsuccessfully sought employment as a truck-driver with petitioners' trucking company. Alleging that this refusal to hire was based on racial considerations, respondent brought this suit claiming a violation of 42 U. S. C. § 1981.[1] He filed his complaint in the United States District Court for the Eastern District of Missouri. Respondent sought monetary damages for backpay, lost insurance benefits, expenses incurred in seeking alternative employment, pain and suffering, interest, attorney's fees, and costs. He moved for a jury trial. That motion was opposed by petitioners with respect to the claims for lost wages, interest, attorney's fees, and costs. The District Court, acting *sua sponte*, entered an order denying a jury trial on all issues, holding that a jury trial is not available in a § 1981 case.

The Court of Appeals for the Eighth Circuit reversed. 638 F. 2d 1137 (1981). Relying on *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975), in which this Court held that both legal and equitable relief is available in actions brought under § 1981, and *Curtis* v. *Loether*, 415 U. S. 189,

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[1] Respondent also alleged that he was refused employment by petitioners in retaliation for filing a charge of discrimination with the Equal Employment Opportunity Commission. Petitioners seek review of the Court of Appeals holding that § 1981 affords a cause of action for a claim based on alleged retaliation for such a filing. I do not believe that this issue merits consideration by the Court at this time.

194 (1974), in which this Court held that "[t]he Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law," the Court of Appeals concluded that respondent was entitled to a jury trial on all of his legal claims. It then held that "backpay or lost wage determinations are inherently in the nature of legal damages," 638 F. 2d, at 1142, and, therefore, present an issue for the jury. The court recognized that other courts had come to a different conclusion, but distinguished this case on one factual ground—respondent did not seek reinstatement—and rejected the argument that backpay is a form of "restitution." See *Lynch* v. *Pan American World Airways*, 475 F. 2d 764 (CA5 1973); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (CA4 1971); *EEOC* v. *Detroit Edison Co.*, 515 F. 2d 301 (CA6 1975), vacated on other grounds, 431 U. S. 951 (1977); *Harkless* v. *Sweeney Independent School District*, 427 F. 2d 319 (CA5 1970).[2]

Even accepting the relevance of the factual distinction drawn by the Court of Appeals, respondent would not have received a jury trial had he filed his complaint in the Sixth Circuit. In *Moore* v. *Sun Oil Co. of Pennsylvania*, 636 F. 2d 154 (1980), the Court of Appeals for the Sixth Circuit confronted exactly the same factual situation as presented by this case. It reached a conclusion that directly conflicts with that reached by the Eighth Circuit:

> "In the instant case, Moore is seeking 'back pay' although he is not seeking the equitable relief of reinstatement by means of an injunction. However, 'back pay,' under the law of this circuit, is equitable relief, and

[2]The Court of Appeals granted rehearing en banc, limited to the question of the permissibility under § 1981 of race-conscious affirmative-action plans designed to remedy racial imbalance in a private employer's work force. The conclusions of the court on this issue are not relevant to the issues presented in the petition for certiorari.

therefore the parties are not entitled to a jury trial with respect to such issue even though reinstatement is not sought." *Id.*, at 156.

Mr. Moore and Mr. Setser sought relief under the same federal statute and were entitled to the same judicial procedure for resolution of their claims. There should be no such a thing as "the law of this circuit" with respect to an issue as fundamental as the right to a jury trial. I would grant the petition and set the case for plenary consideration.

No. 81–5324. UNITED STATES EX REL. RILEY *v.* FRANZEN, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 653 F. 2d 1153.

JUSTICE MARSHALL, dissenting.

Petitioner Thomas Riley was arrested in connection with three homicides. At the time of his arrest, he was 16 years old. Petitioner was held for several hours in a police car and subsequently in a jail cell. In the police station, after being advised of his constitutional rights to remain silent and consult with an attorney, petitioner asked to speak to his father, who had come to the station when he learned of his son's arrest. This request was ignored by the police. Petitioner then confessed to the crimes. After a jury trial in the Circuit Court of Cook County, Ill., he was convicted of two counts of murder and one count of involuntary manslaughter. Prior to trial, Riley unsuccessfully moved to suppress his confession, claiming, *inter alia*, that the request of a juvenile defendant to see a parent is the functional equivalent of an adult's request for an attorney and should terminate police interrogation.

On direct appeal, the Illinois Appellate Court rejected petitioner's challenge to the admissibility of his confession. *People* v. *Riley*, 49 Ill. App. 3d 304, 364 N. E. 2d 306 (1977). The Illinois Supreme Court denied leave to appeal. This Court denied a petition for a writ of certiorari. 435 U. S.

1000 (1978). I dissented, noting that there was a conflict of authority on the question whether an accused child's request to see a parent must be honored by the police before they continue interrogation.

Having exhausted his available state remedies, Riley filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. That court ultimately rejected his claim that the confession should have been suppressed. The United States Court of Appeals for the Seventh Circuit affirmed. 653 F. 2d 1153 (1981). The Court of Appeals relied heavily on this Court's recent decision in *Fare* v. *Michael C.*, 442 U. S. 707 (1979), which held that a juvenile's request for his probation officer did not necessarily constitute an invocation of his Fifth Amendment privilege. Petitioner again filed a petition for a writ of certiorari in this Court. The petition is now denied. Because I continue to believe that the issue presented here is substantial, and because the decision of the court below further contributes to the conflict among authorities, I dissent. The Court's decision in *Fare* v. *Michael C.* does not determine the result in this case. *Fare* v. *Michael C.* emphasized that a probation officer has a statutory duty to report wrongdoing by the juvenile and serve the ends of the juvenile court system. Thus, he would be particularly hampered in his efforts to protect the juvenile's legal rights. Obviously, a parent is in a very different position.

No. 81–5407. MULLIGAN *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County; and

No. 81–5483. WOODARD *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: No. 81–5483, 273 Ark. 235, 617 S. W. 2d 861.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the

Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 80–2033. ROMERO-BARCELO ET AL. *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL., *ante*, p. 816;

No. 81–164. CITY OF PAINESVILLE, OHIO *v.* UNITED STATES, *ante*, p. 894; and

No. 81–5318. PARRISH *v.* CITY OF VIRGINIA BEACH ET AL., *ante*, p. 903. Petitions for rehearing denied.

No. 80–1644. FLORIDA *v.* BROWN, *ante*, p. 819;

No. 80–1986. DISTLER *v.* UNITED STATES, *ante*, p. 827;

No. 80–2090. PRICHARD ET AL. *v.* UNITED STATES, *ante*, p. 832;

No. 80–6578. JOHNSON *v.* LOUISIANA, *ante*, p. 841;

No. 80–6722. MASON *v.* COUNTY OF WORCESTER ET AL., *ante*, p. 845;

No. 80–6737. ALERS ET UX. *v.* CITY GOVERNMENT OF SAN JUAN, *ante*, p. 846;

No. 80–6801. CRENSHAW *v.* UNITED STATES ET AL., *ante*, p. 850;

No. 80–6830. COLE *v.* VINCENT ET AL., *ante*, p. 851;

No. 80–6861. SMITH *v.* KEET, JUDGE, *ante*, p. 853;

No. 80–6906. MILLER *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL., *ante*, p. 855;

No. 80–6937. HILLIARD *v.* WILKINSON ET AL., *ante*, p. 857;

No. 81–104. BLANTON ET UX. *v.* GENERAL ELECTRIC CREDIT CORPORATION OF GEORGIA, *ante*, p. 862;

No. 81–5003. BROUGHTON *v.* BROUGHTON, *ante*, p. 867;

No. 81–5197. LEE *v.* UNITED STATES DEPARTMENT OF LABOR ET AL., *ante*, p. 874; and

No. 81–5269. KAVAJA *v.* UNITED STATES, *ante*, p. 876. Petitions for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

No. 80–6905. IN RE PAREZ, *ante*, p. 810. Petition for rehearing and other relief denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

NOVEMBER 17, 1981

Dismissal Under Rule 53

No. 81-543. EFFRON ET AL. V. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN., EXECUTOR, ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed under this Court's Rule 53. Reported below: 117 Cal. App. 3d 915, 173 Cal. Rptr. 93.

NOVEMBER 18, 1981

Vacated and Remanded on Appeal

No. 81–335. SEA RANCH ASSN. ET AL. *v.* CALIFORNIA COASTAL COMMISSION ET AL. Appeal from D. C. N. D. Cal. Judgment vacated and case remanded to the District Court in order that it may consider whether the case is moot in light of the enactment of Cal. Pub. Res. Code Ann. § 30610.6 (West Supp. 1981). Reported below: 527 F. Supp. 390.

NOVEMBER 27, 1981

Dismissal Under Rule 53

No. 81–801. JOHNSON *v.* KERR-MCGEE OIL INDUSTRIES, INC. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53.

Miscellaneous Order

No. A–439 (81–451). HATHORN ET AL. *v.* LOVORN ET AL. Application to stay the election scheduled for December 5, 1981, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS would grant the application.

NOVEMBER 30, 1981

Affirmed on Appeal

No. 81–589. MCCLUNEY *v.* JOS. SCHLITZ BREWING CO. Affirmed on appeal from C. A. 8th Cir. Reported below: 649 F. 2d 578.

JUSTICE STEVENS, dissenting.

Appellant Forrest McCluney brought this action to recover damages under the Missouri "service letter statute," Mo. Rev. Stat. § 290.140 (1978).[1] McCluney entered into an employment contract with appellee Jos. Schlitz Brewing Co. in Missouri in 1956. In 1970, Schlitz offered McCluney the position of plant manager at its facility in North Carolina. Appellant accepted the position and moved to North Carolina. In 1975, Schlitz offered McCluney a position as vice president of plant operations at Schlitz' corporate headquarters in Wisconsin. McCluney again accepted. Thereafter, McCluney was fired and sought a "service letter" pursuant to the Missouri service letter statute.

In *Horstman* v. *General Electric Co.*, 438 S. W. 2d 18 (Mo. App. 1969), a Missouri state court held, as a matter of state law, that a Missouri resident employed under a Kansas employment contract was not entitled to a service letter under the Missouri service letter statute. The court stated:

> "Considering the legislative intent and construction of the statute by the courts of Missouri, it is clear that appellant is not entitled to a service letter under the Missouri service letter statute because appellant was not

[1] The statute provides that, whenever any employee of a corporation doing business in the State is discharged or voluntarily quits the service of such corporation, the manager of the corporation must issue a letter to the employee setting forth the nature and character of the service rendered by the employee and the reason, if any, for the termination of service.

> hired in Missouri, did not work in Missouri, was not discharged in Missouri, did not request a service letter from an office of respondent in Missouri, received no letters from respondent's office in the State of Missouri, and because there were no contacts between appellant and the State of Missouri insofar as his employment or discharge by respondent was concerned. Appellant's employment contract was a Kansas contract, since that is where he was hired and where he worked." *Id.*, at 21.

In the instant case, the Court of Appeals expressly held that the employment contract entered by appellant in Missouri in 1956 was discharged in 1970 when appellant accepted a promotion to a position as a plant manager in North Carolina; the court unequivocally stated that "[t]his suit is not upon a Missouri contract." 649 F. 2d 578, 583. The Court of Appeals recognized that in *Bliven* v. *Brunswick Corp.*, 575 S. W. 2d 788 (Mo. App. 1978), the court held that a "service letter" was required in a case in which an employee had been hired in Missouri and then transferred to four different States over a 2-year period. The Court of Appeals specifically distinguished *Bliven*, however, in concluding that the instant suit was *not* based upon a Missouri employment contract.[2] In

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[2] As stated by the Court of Appeals:

"Although it is not entirely clear from the court's opinion, it would appear that the plaintiff in *Bliven* performed essentially the same employment function in each facility, and the court characterized the involuntary transfers as part and parcel of the original contract. Moreover, the short duration of employment in each facility highlights the transient nature of Bliven's employment for the fifteen months he worked outside Missouri. By contrast, we hold that McCluney's 1956 contract was discharged in 1970 when he accepted Schlitz's offer of a promotion to plant manager of the Winston-Salem Plant. That 1970 contract was, likewise, discharged when McCluney accepted Schlitz's offer of a promotion to vice president of plant operations in Wisconsin in 1975. The 1975 contract is twice removed from the original 1956 Missouri contract. . . . The simple fact that McCluney was originally hired in Missouri, in the light of his subsequent employment history with Schlitz, is not controlling. This suit is not upon a Missouri contract." 649 F. 2d, at 583.

light of *Horstman*, this conclusion of the Court of Appeals strongly suggests that, as a matter of state law, the Missouri service letter statute does not apply in this case. Without expressly deciding that state law question, however, the Court of Appeals appears to have concluded that an application of the statute to this employment relationship would be unconstitutional.[3]

It is not our business to decide the proper interpretation of Missouri law; indeed, we are precluded from considering state law questions in an appeal from a decision of a federal appellate court. 28 U. S. C. § 1254(2). What is critical, however, is that if the Missouri statute was not applicable *as a matter of state law*, as the Court of Appeals suggests by distinguishing *Bliven* and by ruling that this case was not based on a Missouri contract, then the Court of Appeals should not have considered whether an application of the Missouri statute would violate due process. Certainly, this Court should not affirm what may be nothing more than an advisory opinion that an unintended application of state law would violate the Federal Constitution.[4] Since the Court of Appeals appears to have expressed an opinion on a federal constitutional question without first ruling on a necessary question of state law, I would remand this case to the Court

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[3] The actual holding of the Court of Appeals is not without ambiguity. In the text of its opinion, the court simply rules that the contacts between Missouri and the transaction at issue are not sufficient to permit an application of Missouri law. This proposition is not inconsistent with a ruling that, as a matter of state law, the statute is inapplicable in this case. See *Bliven* v. *Brunswick Corp.*, 575 S. W. 2d 788 (Mo. App. 1978). However, in a footnote early in its opinion, the Court of Appeals stated that "we determine that the extraterritorial application of the Missouri service letter statute to the facts of this case violates due process. . . ." 649 F. 2d, at 580, n. 2.

[4] The question whether the State of Missouri would have the power to require all corporations licensed to do business in the State to give a "service letter" upon request to any person originally hired in the State, even with respect to subsequent employment contracts made in other States, is not as easy as the Court's summary affirmance implies.

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of Appeals for a determination in the first instance of whether, as a matter of state law, the Missouri statute is applicable on the facts of this case.

Appeals Dismissed

No. 80–6692. BUSBEE *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Reported below: 611 S. W. 2d 851.

No. 81–404. COURT HOUSE PLAZA CO. *v.* CITY OF PALO ALTO ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 117 Cal. App. 3d 871, 173 Cal. Rptr. 161.

No. 81–467. FORD MOTOR CREDIT CO. ET AL. *v.* ZAPATA. Appeal from Sup. Ct. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 615 S. W. 2d 198.

No. 81–488. FORD MOTOR CREDIT CO. ET AL. *v.* CASKEY ET AL. Appeal from Sup. Ct. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 616 S. W. 2d 935.

No. 81–669. SHEPHERD CONSTRUCTION CO., INC., ET AL. *v.* GEORGIA. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 248 Ga. 1, 281 S. E. 2d 151.

Certiorari Granted—Reversed and Remanded. (See No. 81–271, *ante*, p. 90.)

Certiorari Granted—Vacated and Remanded

No. 80–2086. EAST BATON ROUGE PARISH SCHOOL BOARD ET AL. *v.* KNIGHTS OF THE KU KLUX KLAN, REALM OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the Equal Access to Justice Act, Pub. L. 96–481, §§ 201–208. Reported below: 643 F. 2d 1034.

Miscellaneous Orders

No. ——. FORTY-EIGHT INSULATIONS, INC. *v.* LIBERTY MUTUAL INSURANCE CO. ET AL. Motion to direct the Clerk to file the cross-petition for writ of certiorari denied.

No. ——. GRAND TRAVERSE AREA SPORT FISHING ASSN. *v.* UNITED STATES ET AL. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. A–309. WADE *v.* TEXAS. Application for bail, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–393. ROMANO ET AL. *v.* UNITED STATES. Application for bail, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D–93. IN RE DISBARMENT OF HENDLER. Disbarment entered. [For earlier order herein, see 429 U. S. 956.]

No. D–254. IN RE DISBARMENT OF WENCKE. It is ordered that Walter Carl Wencke, of Del Mar, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 27, Orig. OHIO *v.* KENTUCKY; and

No. 81, Orig. KENTUCKY *v.* INDIANA ET AL. Motion of Dorothy Cole et al. for leave to intervene referred to the Special Master. [For earlier orders herein, see, *e. g.*, 445 U. S. 939 and 941.]

No. 65, Orig. TEXAS *v.* NEW MEXICO. It is ordered that the order heretofore entered on November 11, 1975, which appeared in 423 U. S. 942, is amended to read as follows: It is ordered that the Honorable Jean Sala Breitenstein, Senior Judge for the United States Court of Appeals for the Tenth Circuit, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court.

The motion of the United States for leave to intervene is referred to the Special Master. [For earlier decision herein, see, *e. g.*, 446 U. S. 540.]

No. 80–702. UNITED STATES *v.* NEW MEXICO ET AL. C. A. 10th Cir. [Certiorari granted, 450 U. S. 909.] Motion of the Solicitor General to permit George W. Jones, Esquire, to present oral argument *pro hac vice* granted.

No. 89, Orig. CALIFORNIA EX REL. STATE LANDS COMMISSION *v.* UNITED STATES. Motion of the United States for judgment on the pleadings is set for oral argument in due course. The defendant shall have 45 days within which to file the opening brief. The brief of the plaintiff shall be filed 30 days after receipt of the opening brief. [For earlier order herein, see *ante*, p. 809.]

No. 80–1538. PLYLER, SUPERINTENDENT, TYLER INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* DOE, GUARDIAN, ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 451 U. S. 968]; and

No. 80–1934. TEXAS ET AL. *v.* CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 452 U. S. 937.] Motion of appellants for divided argument granted.

No. 80–1765. AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. *v.* HYDROLEVEL CORP. C. A. 2d Cir. [Certiorari granted, 452 U. S. 937.] Motion of ECOS Electronics Corp. for leave to file a brief as *amicus curiae* granted.

No. 80–1832. IMMIGRATION AND NATURALIZATION SERVICE *v.* CHADHA ET AL. C. A. 9th Cir. [Probable jurisdiction postponed, *ante*, p. 812];

No. 80–2170. UNITED STATES HOUSE OF REPRESENTATIVES *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 812]; and

No. 80–2171. UNITED STATES SENATE *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 812.] Motion of the Solicitor General for divided argument and for additional time for oral argument granted, and an additional 30 minutes allotted for oral argument.

No. 80–2177. LEHMAN ON BEHALF OF HER CHILDREN, LEHMAN ET AL. *v.* LYCOMING COUNTY CHILDREN'S SERVICES AGENCY. C. A. 3d Cir. [Certiorari granted, *ante*, p. 813.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 81–440. INSURANCE CORPORATION OF IRELAND, LTD., ET AL. *v.* COMPAGNIE DES BAUXITES DE GUINEE. C. A. 3d Cir. [Certiorari granted, *ante*, p. 963.] Motion of respondent Compagnie des Bauxites de Guinee to recall the writ of certiorari denied.

No. 81–523. CONTAINER CORPORATION OF AMERICA *v.* FRANCHISE TAX BOARD. Ct. App. Cal., 1st App. Dist. Motion of appellant to note probable jurisdiction and to hear case in tandem with No. 81–349, *Chicago Bridge & Iron Co.* v. *Caterpillar Tractor Co.* [probable jurisdiction noted, *ante*, p. 1029]; No. 80–2015, *ASARCO Inc.* v. *Idaho State Tax Commission* [probable jurisdiction noted, *ante*, p. 812]; and No. 80–1745, *F. W. Woolworth Co.* v. *Taxation and Revenue Department of New Mexico* [probable jurisdiction noted, *ante*, p. 812], denied. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 81–5114. TIBBS *v.* FLORIDA. Sup. Ct. Fla. [Certiorari granted, *ante*, p. 963.] Motion for appointment of counsel granted, and it is ordered that Louis R. Beller, Esquire, of Miami Beach, Fla., be appointed to serve as counsel for petitioner in this case.

No. 81–5534. RENNIE ET AL. *v.* KLEIN, COMMISSIONER, DEPARTMENT OF HUMAN SERVICES, ET AL. C. A. 3d Cir. Motion of petitioners for expedited consideration and to set case in tandem with No. 80–1417, *Mills* v. *Rogers* [certiorari granted *sub nom. Okin* v. *Rogers*, 451 U. S. 906], denied.

No. 81–5393. IN RE BRADSBY. Petition for writ of habeas corpus denied.

No. 81–5520. IN RE GRIFFITH. Petition for writ of mandamus denied.

No. 81–5600. IN RE PAUL. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 81–613. SPORHASE ET AL. *v.* NEBRASKA EX REL. DOUGLAS, ATTORNEY GENERAL. Appeal from Sup. Ct. Neb. Probable jurisdiction noted. Reported below: 208 Neb. 703, 305 N. W. 2d 614.

No. 80–2162. RAMAH NAVAJO SCHOOL BOARD, INC., ET AL. *v.* BUREAU OF REVENUE OF NEW MEXICO. Appeal from Ct. App. N. M. Motion of Navajo Tribe of Indians for leave to file a brief as *amicus curiae* granted. Probable jurisdiction noted. Reported below: 95 N. M. 708, 625 P. 2d 1225.

Certiorari Granted

No. 80–1305. ALFRED L. SNAPP & SON, INC., ET AL. *v.* PUERTO RICO EX REL. QUIROS, SECRETARY OF LABOR AND HUMAN RESOURCES. C. A. 4th Cir. Certiorari granted. Reported below: 632 F. 2d 365.

No. 80–2146. FLORIDA *v.* ROYER. Dist. Ct. App. Fla., 3d Dist. Certiorari granted. Reported below: 389 So. 2d 1007.

No. 81–497. SUMMIT VALLEY INDUSTRIES, INC. *v.* LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA. C. A. 9th Cir. Certiorari granted. Reported below: 652 F. 2d 65.

No. 80–2195. UNITED STATES *v.* GOODWIN. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 637 F. 2d 250.

No. 81–411. JACKSON TRANSIT AUTHORITY ET AL. *v.* LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL–CIO–CLC. C. A. 6th Cir. Motions of American Public Transit Association and National Institute of Municipal Law Officers for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 650 F. 2d 1379.

No. 80–1012. RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA *v.* NORMAN WILLIAMS CO. ET AL.;

No. 80–1030. BOHEMIAN DISTRIBUTING CO. *v.* NORMAN WILLIAMS CO. ET AL.; and

No. 80–1052. WINE & SPIRITS WHOLESALERS OF CALIFORNIA *v.* NORMAN WILLIAMS CO. ET AL. Ct. App. Cal., 3d App. Dist. Motions of United States Brewers Association and Lloyd H. Robertson, Superintendent, Arizona Department of Liquor Licenses and Control, et al. for leave to file briefs as *amici curiae* in No. 80–1012 granted. Motion of Wine & Spirits Wholesalers of America, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 108 Cal. App. 3d 348, 166 Cal. Rptr. 563.

Certiorari Denied. (See also No. 81–271, *ante*, p. 90, n. 1; and Nos. 81–404, 81–467, and 81–488, *supra*.)

No. 80–1923. FULKS *v.* AVONDALE SHIPYARDS, INC., ET AL.; and

No. 80–2135. AVONDALE SHIPYARDS, INC. *v.* FULKS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 1008.

No. 80–2027. BOYD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 88 Ill. App. 3d 825, 410 N. E. 2d 931.

No. 80–2203. PIERCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 60.

No. 80–6693. HERRON *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 89 Ill. App. 3d 1048, 412 N. E. 2d 1365.

No. 80–6774. STECH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 457.

No. 80–6925. CHRISTIAN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81–16. CALDWELL ET AL. *v.* MISSOURI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 667 F. 2d 643.

No. 81–71. UNION *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 929.

No. 81–85. DARCLY, INC. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–125. CARDINAL FEDERAL SAVINGS & LOAN ASSN. *v.* DAVIS, ADMINISTRATRIX. Sup. Ct. Ohio. Certiorari denied. Reported below: 66 Ohio St. 2d 74, 419 N. E. 2d 1094.

No. 81–215. AVERY *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 917.

No. 81–222. VALERO ENERGY CORP. *v.* SOHYDE DRILLING & WORKOVER, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 2d 1132.

No. 81–311. CITY OF PALM BEACH GARDENS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 635 F. 2d 337.

No. 81–312. CROW TRIBE OF INDIANS, MONTANA, ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 645 F. 2d 701.

No. 81–352. LEWIS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 430 A. 2d 528.

No. 81–356. ANDERSON ET AL. *v.* CITY OF NORTHLAKE. C. A. 7th Cir. Certiorari denied. Reported below: 657 F. 2d 272.

No. 81–371. CARNEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 214 U. S. App. D. C. 246, 665 F. 2d 1064.

No. 81–396. LEE STOLLER ENTERPRISES, INC., ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 652 F. 2d 1313.

No. 81–398. RIEGLE, UNITED STATES SENATOR *v.* FEDERAL OPEN MARKET COMMITTEE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 211 U. S. App. D. C. 284, 656 F. 2d 873.

No. 81–400. JUANES ET AL. *v.* SOUTHWESTERN PUBLIC SERVICE CO. ET AL.; and

No. 81–609. NEW YORK UNDERWRITERS INSURANCE CO. *v.* JUANES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 67.

No. 81–402. SOLTERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 67.

No. 81–425. FRANCIS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 646 F. 2d 251.

No. 81–438. BASIC BIBLE CHURCH OF AMERICA, CHAPTER 8035 *v.* COUNTY OF HENNEPIN. Sup. Ct. Minn. Certiorari denied.

No. 81–447. CITY OF WICHITA FALLS, TEXAS, ET AL. *v.* STONE. C. A. 5th Cir. Certiorari denied. Reported below: 646 F. 2d 1085.

No. 81–472. PRINCE GEORGE'S COUNTY, MARYLAND *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 210 U. S. App. D. C. 87, 654 F. 2d 802.

No. 81–473. BILLINGSLY *v.* VANCE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 935.

No. 81–481. BURNAMAN *v.* SINGLETON. Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Certiorari denied.

No. 81–490. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 646 F. 2d 970.

No. 81–486. MARTINS FERRY HOSPITAL ASSN. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. (two cases). C. A. 6th Cir. Certiorari denied. Reported below: 649 F. 2d 445 (first case); 654 F. 2d 455 (second case).

No. 81–521. BECHTEL CORP. ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 648 F. 2d 660.

No. 81–530. CHERNABAEFF *v.* MOSS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 64.

No. 81–542. PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 653 F. 2d 1134.

No. 81–548. KOPPERS CO., INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 290.

No. 81–569. COLE *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 657 F. 2d 107.

No. 81–570. ROBERTS *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 290 Md. 720.

No. 81–584. ORECK CORP. *v.* WHIRLPOOL CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 639 F. 2d 75.

No. 81–591. FREGLETTE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 80 App. Div. 2d 904, 438 N. Y. S. 2d 663.

No. 81–607. WELDON *v.* HUNT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 935.

No. 81–608. SCHLESINGER *v.* SCHLESINGER. Ct. Sp. App. Md. Certiorari denied. Reported below: 48 Md. App. 782.

No. 81–621. TAYLOR ET AL. *v.* GRAHAM ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 399 So. 2d 1374.

No. 81–624. O'CONNELL ET AL. *v.* KNISKERN, SUPERINTENDENT OF SCHOOLS OF THE SCHOOL DISTRICT OF MUKWONAGO, ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–629. CLARK *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 291 Ore. 231, 630 P. 2d 810.

No. 81–635. O'CONNOR, BY HER PARENTS AND NEXT FRIENDS, O'CONNOR ET UX. *v.* BOARD OF EDUCATION OF SCHOOL DISTRICT 23 ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 578.

No. 81–640. BERGER *v.* NORTH AMERICAN COMPANY FOR LIFE & HEALTH INSURANCE. C. A. 5th Cir. Certiorari denied. Reported below: 648 F. 2d 305.

No. 81–641. DEPENDAHL ET AL. *v.* KALMANOVITZ. C. A. 8th Cir. Certiorari denied. Reported below: 653 F. 2d 1208.

No. 81–642. BANK OF MONTREAL *v.* OLAFSSON. C. A. 6th Cir. Certiorari denied. Reported below: 648 F. 2d 1078.

No. 81–647. CAMMISANO *v.* UNITED STATES SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS. C. A. D. C. Cir. Certiorari denied. Reported below: 211 U. S. App. D. C. 2, 655 F. 2d 1232.

No. 81–648. AMAAN ET AL. *v.* CITY OF EUREKA, MISSOURI, ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 615 S. W. 2d 414.

No. 81–652. ARNOLD ET AL. *v.* CNA FINANCIAL CORP. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 285.

No. 81–654. SUPANICK *v.* SUPANICK. Sup. Ct. Ohio. Certiorari denied. Reported below: 66 Ohio St. 2d 360, 421 N. E. 2d 1301.

No. 81–655. MOOTZ *v.* MOOTZ. Sup. Ct. Tex. Certiorari denied.

No. 81–659. DEJAMES *v.* MAGNIFICENCE CARRIERS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 654 F. 2d 280.

No. 81–662. ROSNER *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 80 App. Div. 2d 801.

No. 81–665. UNION PLANTERS NATIONAL BANK OF MEMPHIS *v.* J & C COLOR INDUSTRIES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1071.

No. 81–668. JOSEPH C. HOFGESANG SAND CO., INC. *v.* LOUISVILLE AND JEFFERSON COUNTY BOARD OF ZONING ADJUSTMENT. Sup. Ct. Ky. Certiorari denied. Reported below: 617 S. W. 2d 40.

No. 81–670. JONES *v.* TAIBBI ET AL. C. A. 1st Cir. Certiorari denied.

No. 81–673. SUSSLI *v.* CITY OF SAN MATEO ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 120 Cal. App. 3d 1, 173 Cal. Rptr. 781.

No. 81–674. GRIFFIN, MAYOR OF BUFFALO *v.* ARTHUR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 907.

No. 81–678. FORTY-FOUR HUNDRED EAST BROADWAY CO. *v.* 4400 EAST BROADWAY. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 170.

No. 81–682. LEBLANC *v.* PETCO, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 617.

No. 81–689. GREFCO, INC. *v.* KEWANEE INDUSTRIES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 671 F. 2d 495.

No. 81–696. J. E. GUERTIN CO. ET AL. *v.* CACHAT, BY HER FATHER AND NATURAL GUARDIAN, CACHAT, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 53 N. Y. 2d 475, 425 N. E. 2d 851.

No. 81–705. STATE BOARD OF EQUALIZATION OF NORTH DAKOTA ET AL. *v.* OGILVIE, TRUSTEE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 657 F. 2d 204.

No. 81–714. ANDERSON *v.* LOW RENT HOUSING COMMISSION OF MUSCATINE, IOWA, ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 304 N. W. 2d 239.

No. 81–715. BRADLEY ET AL., T/A BRADLEY BROTHERS CLEANERS & LAUNDERERS *v.* J. F. BATTE & SONS OF RICHMOND, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 488.

No. 81–740. HENNESSY INDUSTRIES, INC. *v.* B & J MANUFACTURING CO. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 1075.

No. 81–744. LAKA TOOL & STAMPING CO., INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 226 Ct. Cl. 83, 639 F. 2d 738, and 227 Ct. Cl. 468, 650 F. 2d 270.

No. 81–765. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 657 F. 2d 44.

No. 81–780. ACKERMAN ET AL. *v.* NATIONAL BUREAU OF STANDARDS ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–793. BURCHINAL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 657 F. 2d 985.

No. 81–820. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 757 F. 2d 92.

No. 81–5037. FOX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 270.

No. 81–5043. KOSINSKI *v.* OHIO. Ct. App. Ohio, Geauga County. Certiorari denied.

No. 81–5076. GREEN *v.* CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 649 F. 2d 285.

No. 81–5090. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 616 S. W. 2d 229.

No. 81–5112. RODGERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 81–5121. OLMO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 280.

No. 81–5205. JOHNSON *v.* HILTON ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–5266. NEAL *v.* HARGREAVES, CIRCUIT JUDGE OF LANE COUNTY, OREGON. Sup. Ct. Ore. Certiorari denied.

No. 81–5274. BAGBY *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 650 F. 2d 836.

No. 81–5277. CLEVELAND *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 81–5298. SWINK *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 617 S. W. 2d 203.

No. 81–5314. BENEDICT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 928.

No. 81–5315. BROWN, AKA WILCOX *v.* CRIST, WARDEN, MONTANA STATE PRISON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 728.

No. 81–5427. BARDEN *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 432 A. 2d 404.

No. 81–5486. CHASTEEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–5498. JOHNSON *v.* U. S. DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 219.

No. 81–5504. GALIS *v.* WAINWRIGHT, SECRETARY OF THE DEPARTMENT OF OFFENDER REHABILITATION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 81–5506. ZATKO *v.* U. S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 81–5507. MCDONALD *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 81–5508. SOUNESS *v.* VETERANS ADMINISTRATION. C. A. 1st Cir. Certiorari denied.

No. 81–5516. GANEY ET AL. *v.* EDWARDS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 667 F. 2d 1022.

No. 81–5518. HAYWOOD *v.* WOLFF, WARDEN, JOLIET PENITENTIARY. C. A. 7th Cir. Certiorari denied. Reported below: 658 F. 2d 455.

No. 81–5524. SWINICK *v.* BERGMAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–5526. AFRICA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 292 Pa. Super. 479, 433 A. 2d 102.

No. 81–5527. UNITED STATES EX REL. ABDUS-SABUR *v.* CUYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION, GRATERFORD, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 653 F. 2d 828.

No. 81–5533. THOMSON *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1090.

No. 81–5536. TUCKER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 403 So. 2d 1271.

No. 81–5537. SPHALER *v.* WAINWRIGHT, SUPERINTENDENT, LAWTEY CORRECTIONAL INSTITUTION. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 81–5539. HARRIS *v.* ESTELLE. C. A. 5th Cir. Certiorari denied. Reported below: 652 F. 2d 998.

No. 81–5541. SUTTON *v.* GASTON. C. A. 4th Cir. Certiorari denied. Reported below: 667 F. 2d 1023.

No. 81–5544. LOFTON *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 653 F. 2d 215.

No. 81–5545. WEBB *v.* ALBERTO-CULVER CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 1116.

No. 81–5563. BRISCOE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 293.

No. 81–5568. IN RE ZATKO. C. A. D. C. Cir. Certiorari denied.

No. 81–5569. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 81–5570. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5571. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5572. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

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No. 81–5574. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5579. COUCH *v.* BLACK, SUPERINTENDENT, KENTUCKY STATE REFORMATORY. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 214.

No. 81–5582. STEVENS *v.* ALLSBROOK, SUPERINTENDENT, ODOM CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 671 F. 2d 501.

No. 81–5583. MEGGETT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION. C. A. 5th Cir. Certiorari denied. Reported below: 657 F. 2d 1249.

No. 81–5586. DAVIS *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. D. C. Cir. Certiorari denied. Reported below: 209 U. S. App. D. C. 202, 652 F. 2d 195.

No. 81–5603. COLEMAN *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 621 P. 2d 869.

No. 81–5622. HINTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 81–5627. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 2d 916.

No. 81–5630. BEACH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 81–5637. WILKERSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 432 A. 2d 730.

No. 81–5639. REICHARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 612.

No. 81–5643. PITTS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 81–5644. HAWKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 655 F. 2d 234.

No. 81–5649. MAXWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81–5653. TRAPNELL *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 1075.

No. 81–5657. KNAPP *v.* BESHEAR, ATTORNEY GENERAL OF KENTUCKY. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1072.

No. 81–5662. VILLAR-MEDINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81–5668. GREEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–5673. EWELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 901.

No. 80–2152. MISSOURI ET AL. *v.* LIDDELL ET AL. C. A. 8th Cir. Motion of respondents Liddell et al. for leave to proceed *in forma pauperis* granted. Motions of Bayless School District et al.; School District of City of Ladue of St. Louis County, Missouri; and North Kansas City, Missouri, School District for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 667 F. 2d 643.

No. 81–113. SOWDERS, PENITENTIARY SUPERINTENDENT *v.* WILEY. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 647 F. 2d 642.

No. 81–568. TEXAS *v.* MYERS. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 618 S. W. 2d 365.

No. 81–276. ALVARADO *v.* INWOOD PANAMA, S. A. C. A. 2d Cir. Motion of petitioner for leave to proceed as a seaman granted. Certiorari denied. Reported below: 657 F. 2d 262.

No. 81–321. COLVILLE CONFEDERATED TRIBES *v.* WALTON ET AL.; and

No. 81–421. WASHINGTON *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 647 F. 2d 42.

No. 81–587. EWING *v.* BAUMRIND. Sup. Ct. S. C. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 276 S. C. 350, 279 S. E. 2d 359.

No. 81–360. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* MARSH, SECRETARY OF THE ARMY, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 210 U. S. App. D. C. 233, 655 F. 2d 346.

No. 81–623. OWENS ET AL. *v.* AETNA LIFE & CASUALTY CO. ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 654 F. 2d 218.

No. 81–666. PANTER ET AL. *v.* MARSHALL FIELD & CO. ET AL. C. A. 7th Cir. Motion of Marshall Field & Co. et al. to strike the brief of the Weiss respondents denied. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. JUSTICE WHITE and JUSTICE STEVENS took no part in the consideration or decision of this motion and this petition. Reported below: 646 F. 2d 271.

No. 81–753. TRANS TECH, INC. *v.* INTERDYNAMICS, INC., ET AL. C. A. 3d Cir. Motion of petitioner to defer consideration of the petition for certiorari denied. Certiorari denied. Reported below: 653 F. 2d 93.

No. 81–677. MINNESOTA MINING & MANUFACTURING CO. ET AL. *v.* VELO-BIND, INC.; and

No. 81–681. VELO-BIND, INC. *v.* MINNESOTA MINING & MANUFACTURING CO. ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE BLACKMUN took no part in the consideration or decision of these petitions. Reported below: 647 F. 2d 965.

No. 81–5408. MCCLESKEY *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County; and

No. 81–5523. RUIZ ET AL. *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: No. 81–5523, 273 Ark. 94, 617 S. W. 2d 6.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 80–2106. GENERAL ATOMIC CO. *v.* UNITED NUCLEAR CORP., *ante*, p. 878;

No. 80–6514. HAWKINS *v.* TEXAS, *ante*, p. 919;

No. 80–6610. JOHNSON *v.* FLORIDA, *ante*, p. 882;

No. 80–6671. TYLER *v.* GEORGIA, *ante*, p. 882;

No. 80–6786. STRICKLAND *v.* GEORGIA, *ante*, p. 882;

No. 80–6839. BROWN *v.* GEORGIA, *ante*, p. 882;

No. 80–6844. JUSTUS *v.* GEORGIA, *ante*, p. 882;

No. 81–5227. LAMORE *v.* INLAND DIVISION OF GENERAL MOTORS CORP. ET AL., *ante*, p. 900;

No. 81–5328. JOHL *v.* ACTORS' EQUITY ASSN. ET AL., *ante*, p. 903; and

No. 81–5440. GREEN *v.* CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL., *ante*, p. 944. Petitions for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

No. 80–2014. SAMARA *v.* UNITED STATES, *ante*, p. 829;

No. 80–2055. WHITE *v.* UNITED STATES, *ante*, p. 830;

No. 80–2061. ROME *v.* KANSAS EX REL. COMMISSION ON JUDICIAL QUALIFICATIONS, *ante*, p. 830;

No. 80–2113. J. W. BATESON, INC. *v.* UNITED STATES, *ante*, p. 833;

No. 80–2186. BOYD *v.* WESTERN ELECTRIC ET AL., *ante*, p. 836;

No. 80–6364. STEVENS *v.* KIRKPATRICK, *ante*, p. 839;

No. 80–6624. MUKA *v.* COHN ET AL.; and MUKA *v.* FOLEY ET AL., *ante*, p. 841;

No. 80–6696. LINDEN *v.* FOX ET AL., *ante*, p. 802;

No. 81–5143. LINDEN *v.* DIAL PRESS ET AL., *ante*, p. 802;

No. 80–6710. FRAZIER *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 845;

No. 80–6831. SCOTT *v.* SMALL BUSINESS ADMINISTRATION, *ante*, p. 851;

No. 80–6945. KERNER *v.* HAELSIG, AKA KERNER, *ante*, p. 858;

No. 81–18. WOOLRIDGE *v.* KENTUCKY, *ante*, p. 859;

No. 81–131. QUINN-MOORE ET AL. *v.* LAMBERT, BANK COMMISSIONER OF ARKANSAS, ET AL., *ante*, p. 805;

No. 81–145. TODD *v.* UNITED STATES, *ante*, p. 864;

No. 81–163. LYON ET AL. *v.* CALIFORNIA ET AL., *ante*, p. 865;

No. 81–182. TAHOE SHOREZONE REPRESENTATION *v.* CALIFORNIA ET AL., *ante*, p. 865;

No. 81–5004. FORD *v.* ALDISERT ET AL., *ante*, p. 867;

No. 81–5095. IN RE SIMS, *ante*, p. 811;

No. 81–5116. CHANDLER *v.* COCHRAN ET AL., *ante*, p. 872; and

No. 81–5149. GREEN *v.* ALLEN, CORRECTIONS DIRECTOR, ET AL., *ante*, p. 873. Petitions for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

No. 81–5150. GREEN *v.* WARDEN, FEDERAL CORRECTIONAL INSTITUTION, TALLEDAGA, ALABAMA, ET AL., *ante*, p. 818;

No. 81–5293. GREEN *v.* PERRIN, WARDEN, NEW HAMPSHIRE PRISON, ET AL., *ante*, p. 876;

No. 81–5294. GREEN *v.* WARDEN, U. S. PENITENTIARY, LEAVENWORTH, KANSAS, ET AL., *ante*, p. 877;

No. 81–5161. CAULTON *v.* HOSPITAL OF THE GOOD SAMARITAN, *ante*, p. 873; and

No. 81–5176. QUARTERMAN *v.* QUARTERMAN ET AL., *ante*, p. 874. Petitions for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

No. 80–2119. CRONEN *v.* CITY OF GALENA PARK, TEXAS, *ante*, p. 833. Motion of petitioner to proceed further herein *in forma pauperis* granted. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this petition.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Stewart (retired) to perform judicial duties in the United States Court of Appeals for the Seventh Circuit beginning February 24, 1982, and ending February 26, 1982, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

DECEMBER 4, 1981

Dismissal Under Rule 53

No. 80–6835. STREET *v.* NATIONAL BROADCASTING CO. C. A. 6th Cir. [Certiorari granted, *ante*, p. 815.] Stipulation to dismiss the writ of certiorari was filed, and the case was dismissed pursuant to this Court's Rule 53.

DECEMBER 7, 1981

Appeals Dismissed

No. 81–5280. LEMAY *v.* TENNESSEE. Appeal from Ct. Crim. App. Tenn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 622 S. W. 2d 62.

No. 81–5566. DENARDO *v.* MURPHY. Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Miscellaneous Orders

No. A–447. IN RE MYLES. Application for writ of habeas corpus, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 89, Orig. CALIFORNIA EX REL. STATE LANDS COMMISSION *v.* UNITED STATES. Motion of California for summary judgment is consolidated for oral argument with the motion of the United States for judgment on the pleadings. Opening briefs on both motions shall be filed within 45 days from November 30, 1981. Reply briefs, if any, may be filed within 30 days of receipt of the opening briefs. [For earlier order herein, see, *e. g.*, *ante*, p. 1077.]

No. 80–2116. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. The order entered November 9, 1981 [*ante*, p. 1030], is amended to read as follows: Certiorari granted limited to Questions 3 and 4 presented by the petition.

No. 80–2205. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS *v.* MURRAY. C. A. 7th Cir. [Certiorari granted, *ante*, p. 962.] Motion for appointment of counsel granted, and it is ordered that John S. Elson, Esquire, of Chicago, Ill., be appointed to serve as counsel for respondent in this case.

No. 81–296. IN RE RICH. D. C. W. D. N. C. Petition for common-law writ of certiorari denied. Reported below: 514 F. Supp. 481.

No. 81–5617. IN RE BEACHBOARD. Petition for writ of mandamus denied.

Certiorari Granted

No. 81–525. BOWEN *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 642 F. 2d 79.

No. 81–574. GENERAL TELEPHONE COMPANY OF THE SOUTHWEST *v.* FALCON. C. A. 5th Cir. Certiorari granted. Reported below: 647 F. 2d 633.

Certiorari Denied. (See also Nos. 81–5280, 81–5566, and 81–296, *supra.*)

No. 80–2211. SMITH BARNEY, HARRIS, UPHAM & CO., INC. *v.* HENRICKSEN. C. A. 7th Cir. Certiorari denied. Reported below: 640 F. 2d 880.

No. 80–6860. WILLIAMSON *v.* WILLIAMSON. Sup. Ct. Ga. Certiorari denied. Reported below: 247 Ga. 260, 275 S. E. 2d 42.

No. 81–69. RICHARDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 765.

No. 81–87. MOELLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 2d 518.

No. 81–151. FINE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 2d 1018.

No. 81–237. KNIGHT *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 616 S. W. 2d 593.

No. 81–241. WARD LUMBER CO. *v.* BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 50 N. C. App. 294, 273 S. E. 2d 331.

No. 81–256. MOORE *v.* SCURR, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 647 F. 2d 854.

No. 81–315. LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 89, AFL–CIO *v.* PIEDERMANN. C. A. 9th Cir. Certiorari denied. Reported below: 649 F. 2d 869.

No. 81–326. FENZ *v.* BURKE ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 81–345. MCCAUSLAND *v.* MASON COUNTY BOARD OF EDUCATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 649 F. 2d 278.

No. 81–351. VETCO INC. ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 691 F. 2d 1281.

No. 81–376. WRIGHT, JUDGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 654 F. 2d 268.

No. 81–518. VICHOS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 935.

No. 81–572. UNITED STEELWORKERS OF AMERICA, LOCAL 8141 *v.* TOOLEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 648 F. 2d 1239.

No. 81–686. BANERJEE *v.* BOARD OF TRUSTEES OF SMITH COLLEGE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 648 F. 2d 61.

No. 81–691. CONOCO INC. ET AL. *v.* PETROL STOPS NORTHWEST. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 1005.

No. 81–697. CAMPBELL *v.* WASHINGTON STATE BAR ASSN. C. A. 9th Cir. Certiorari before judgment denied.

No. 81–699. ADDINGTON *v.* FARMER'S ELEVATOR MUTUAL INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 650 F. 2d 663.

No. 81–700. LOESCH ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 227 Ct. Cl. 34, 645 F. 2d 905.

No. 81–704. MISKINIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–707. MILLER *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 81–710. SCHLESINGER *v.* SCHLESINGER. Ct. Sp. App. Md. Certiorari denied. Reported below: 48 Md. App. 782.

No. 81–713. JAMES MCHUGH CONSTRUCTION CO. *v.* COMPTROLLER OF THE TREASURY, RETAIL SALES TAX DIVISION, FOR THE STATE OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 291 Md. 48, 431 A. 2d 1353.

No. 81–716. AMERICAN FEDERATION OF TELEVISION & RADIO ARTISTS, CLEVELAND LOCAL, AFL–CIO *v.* STORER BROADCASTING CO. C. A. 6th Cir. Certiorari denied. Reported below: 660 F. 2d 151.

No. 81–719. MAPLE PROPERTIES *v.* SUPERIOR COURT OF LOS ANGELES COUNTY (HARRIS ET AL., REAL PARTIES IN INTEREST). Sup. Ct. Cal. Certiorari denied. Reported below: 29 Cal. 3d 442, 629 P. 2d 1369.

No. 81–720. CLEVELAND *v.* NOLAND ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 702.

No. 81–724. ALYESKA PIPELINE SERVICE CO. *v.* ANDERSON ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 629 P. 2d 512.

No. 81–728. PRICE BROTHERS CO. *v.* PHILADELPHIA GEAR CORP. C. A. 6th Cir. Certiorari denied. Reported below: 649 F. 2d 416.

No. 81–739. SIMPSON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 230 Kan. ix, 632 P. 2d 1080.

No. 81–747. PATTERSON ET AL. *v.* YOUNGSTOWN SHEET & TUBE CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 659 F. 2d 736.

No. 81–767. GAGE *v.* WEXLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 649 F. 2d 867.

No. 81–862. ROBERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 650 F. 2d 84.

No. 81–866. ALVAREZ-ROMERO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 728.

No. 81–5060. JOHNSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 400 So. 2d 673.

No. 81–5215. ZAEHRINGER *v.* BREWER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 635 F. 2d 734.

No. 81–5243. COTNER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81–5305. BLANCETT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 777.

No. 81–5317. AUSTIN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 81–5333. RAYSOR *v.* GABBEY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 910.

No. 81–5517. FOSTER *v.* HARRISON, WARDEN, FORT PILLOW STATE FARM. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1071.

No. 81–5547. SMITH *v.* ROSS, INDUSTRIAL COMMISSIONER OF NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 81–5549. NEAL *v.* COURT OF APPEALS OF MISSOURI, SOUTHERN DISTRICT; and OGLE *v.* COURT OF APPEALS OF MISSOURI, SOUTHERN DISTRICT, ET AL. Sup. Ct. Mo. Certiorari denied.

No. 81–5550. MOKONE *v.* BYRNE, GOVERNOR OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–5553. COSGROVE *v.* PENNSYLVANIA DEMOCRATIC STATE COMMITTEE ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–5555. LADD *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 431 A. 2d 60.

No. 81–5560. JOHNSON *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 185 Conn. ——, 440 A. 2d 858.

No. 81–5564. BUTLER *v.* HARRINGTON. C. A. 5th Cir. Certiorari denied. Reported below: 657 F. 2d 1250.

No. 81–5575. WEST *v.* AUSTIN, WARDEN, REIDSVILLE STATE PRISON. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 777.

No. 81–5585. LUNZ *v.* JIMENEZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1202.

No. 81–5590. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5591. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 81–5592. SMALL *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 631 P. 2d 148.

No. 81–5607. TORKAR *v.* CITY OF SEATTLE, WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 28 Wash. App. 1035.

No. 81–5593. SELLARS *v.* PROCUNIER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 641 F. 2d 1295.

No. 81–5596. VECCHIO *v.* DORFMAN ET AL. C. A. 5th Cir. Certiorari denied.

No. 81–5598. GREEN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81–5599. BELL *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 402 So. 2d 442.

No. 81–5608. GUZMAN *v.* HONGISTO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1059.

No. 81–5609. HALL *v.* JAGO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1071.

No. 81–5611. FOWLER *v.* GARRAHY, GOVERNOR OF RHODE ISLAND, ET AL. C. A. 1st Cir. Certiorari denied.

No. 81–5631. HOOKS *v.* BUTTERWORTH. C. A. 1st Cir. Certiorari denied.

No. 81–5654. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81–5672. ALLEN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 81–5681. BABBE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 293.

No. 81–5689. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 653 F. 2d 384.

No. 81–5692. BEAMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1028.

No. 81–5693. CAMPBELL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 660 F. 2d 829.

No. 81–5697. WILKENS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 659 F. 2d 769.

No. 81–5699. WILDER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 661 F. 2d 937.

No. 81–5717. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 929.

No. 81–5720. DOLOIR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 901.

No. 81–5722. RAJAI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 1079.

No. 81–5734. NILSEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 905.

No. 81–187. KEY ET AL. *v.* WISE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 629 F. 2d 1049.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

Petitioners, the Keys, brought this action in the District Court for the Northern District of Mississippi against respondents, the Wises and the United States. They sought to quiet title to 451 acres of land in Humphreys County, Miss., over which the United States had acquired two easements from the Wises. The Federal Quiet Title Act[1] vests *exclusive* original jurisdiction of such suits in the federal district courts and waives the sovereign immunity of the United States only in respect to such suits. The District Court first denied motions of the Wises and the United States to dismiss the suit. This was correct in light of the Act. But the court

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[1] 28 U. S. C. §§ 1346(f), 2409a (enacted Oct. 25, 1972).

Title 28 U. S. C. § 2409a provides in pertinent part:

"(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights."

Title 28 U. S. C. § 1346(f) provides:

"The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States."

then, *sua sponte*, entered an order of abstention remitting the parties to initiation of an action in the state courts of Mississippi.[2] That order was a patent flouting of the congressional mandate pre-empting state court jurisdiction and requiring the District Court to exercise its original and exclusive jurisdiction. Nonetheless, petitioners' motion for reconsideration was denied. The Court of Appeals for the Fifth Circuit, without filing an opinion, dismissed the appeal and denied petitioners' motion to stay state court proceedings pending appeal.

The Wises brought suit meanwhile against petitioners in Mississippi Chancery Court, which declared title in the Wises. While the case was pending before the Mississippi Supreme Court, petitioners sought a writ of mandamus from the Court of Appeals to order the District Court to rescind the abstention order. The application was denied by the Court of Appeals, again without opinion. We denied certiorari *sub nom. Key* v. *Keady*, 429 U. S. 1023 (1976). Having failed on their motion to reconsider, on their appeal from the abstention order, and on an extraordinary writ of mandamus, petitioners took the only recourse open to them: They objected to the Chancery Court's exercise of jurisdiction in the Mississippi Supreme Court on the ground that under the Federal Quiet Title Act the United States District Court had *exclusive* jurisdiction. The Mississippi Supreme Court rejected petitioners' pre-emption objection based on the Quiet Title Act on the ground that since the Wises, as plaintiffs in the suit, did not controvert any interest claimed by the United States, the Quiet Title Act was irrelevant to the state court suit. *Key* v. *Wise*, 341 So. 2d 1326 (1977).

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[2]The court stated, in rendering the abstention order:

"The Court is further of the view that as between these private litigants, . . . the state law questions regarding titles to real estate predominate in this case and it is an area in which the Chancery Court of Humphreys County and the Mississippi Supreme Court has *[sic]* expertise and the parties should repair to those courts for a determination of these questions." App. to Pet. for Cert. A–39.

The District Court's abstention order directed the parties to return to federal court following final judgment in the state court suit.[3] Accordingly, the parties returned to the District Court. Thereupon the Wises moved to dismiss petitioners' suit on the ground that the state court judgment was res judicata. Inexplicably, the District Court granted the motion and, even more inexplicably, a divided panel of the Court of Appeals for the Fifth Circuit affirmed. 629 F. 2d 1049 (1980). And today this Court, incomprehensibly, denies the Keys' petition for certiorari. I respectfully dissent.

The significance of a state court acting in an area of exclusive federal jurisdiction is such that we have held that even a contempt conviction for violation of a state court order in a matter pre-empted by federal law may be void and of no effect. See *In re Green*, 369 U. S. 689, 692 (1962). Thus, this case is a most obvious candidate for summary reversal, or at the very least for the grant of plenary argument and decision. Even the Government, a prevailing party under the Court of Appeals' judgment, regards the federal jurisdictional issue of such moment, and the error below so egregious, that the Solicitor General has submitted a memorandum in support of the petition, which states that this is a case in which a federal appellate decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of the Court's power of supervision," quoting Rule 17.1(a) of this Court's Rules, and suggests that "the Court may wish to consider summary reversal." Memorandum for United States 13.

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[3]The first abstention order provided that "when any suit filed in the state forum results in a final judgment on the issues involved, this Court will proceed to a final disposition of this action and grant such relief as may then be appropriate." *Id.*, at A–41. The second abstention order, which was issued when the District Court denied the motion for reconsideration, provided that "upon the final outcome of the litigation instituted by defendants in the Chancery Court of Humphreys County, counsel for plaintiff and defendants [shall] notify this court of the issues then remaining in the cause." *Id.*, at A–47.

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What renders the Court's denial of the petition particularly inexplicable, indeed incredible, is that the Court of Appeals held that the order of abstention was clearly improper because it patently flouted the mandate of the Quiet Title Act and the District Court's original and exclusive jurisdiction of the case. Indeed, the Court of Appeals also held that the abstention order was improper because Mississippi property law, although perhaps difficult to ascertain, "was in no sense unsettled." 629 F. 2d, at 1059. See *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800, 813–817 (1976). Finally, the Court of Appeals strongly suggested that the Mississippi Supreme Court had misinterpreted the Quiet Title Act in asserting that the Mississippi courts could exercise jurisdiction of cases within that Act. 629 F. 2d, at 1057–1058.[4] Yet the Court of Appeals' extraordinary conclusion was that the Mississippi Supreme Court's decision in favor of its jurisdiction collaterally estopped further consideration of that question upon the parties' return to the District Court pursuant to the express provision of the abstention order. *Id.*, at 1061–1068.

The Keys were not voluntarily before the Mississippi courts on the question of jurisdiction. The federal courts had denied a motion to reconsider, an appeal, and a motion to

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[4] Certainly the state court's interpretation of that Act is difficult to harmonize with our interpretation in *California* v. *Arizona*, 440 U. S. 59, 66–68 (1979). A further problem is that under the state court's rendering of the Act a claimant seeking to establish an interest in land adverse to an interest claimed by the United States can lose in state court but can never win because he cannot bind the United States in such an action. That was precisely the circumstance here. In the state court suit the Wises sued the Keys to clear a cloud on the title. But the Keys could not file a counterclaim in the state court to establish their interest in the land, since they would have to join the United States as a defendant. Although the Keys were thus put at risk in the state court proceeding, they could not establish their own interest. As the dissent below noted: "Certainly congressional policy ought not to be flouted by the sheer circumstance of how the case comes out [in the state court]. Exclusivity should be applied with an even hand." 629 F. 2d, at 1071 (Brown, J.).

stay the state court proceedings. Petitioners continued to pursue their federal court remedies by seeking a writ of mandamus while the case was pending before the Mississippi Supreme Court. Petitioners raised the jurisdictional question in the Mississippi Supreme Court because that was the only forum then open to them to assert their claim that the Quiet Title Act pre-empted state jurisdiction.

Moreover, it is implicit in the abstention order that the District Court made the initial decision that the state courts had jurisdiction notwithstanding the Quiet Title Act. It follows that the District Court was free to review that determination on the parties' return, or at least that the Court of Appeals was free to review the District Court's decision.[5]

England v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964), is precisely applicable to this situation, and compels summary reversal of the Court of Appeals' judgment, or at the least its plenary review by this Court. *England* held that while principles of *Pullman*[6] abstention may require a federal plaintiff to present unsettled questions of *state* law to the state court for initial determination, the litigant may not be compelled to submit questions of *federal* law to the state courts. 375 U. S., at 415. Abstention's "recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *Id.*, at 415–416. It is certainly obvious that the question of the exclusiveness of the District Court's jurisdiction in this case is a question of federal law.

Even if petitioners would have been barred from raising the pre-emption claim had they "voluntarily" submitted the federal question to the state court, *id.*, at 421, in no sense can petitioners' submission in this case of the question of the state court's subject matter jurisdiction upon pain of waiver, and

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[5] The Court of Appeals' two earlier decisions in this case would not bar consideration of this issue because neither was necessarily a determination on the merits of the abstention order or the claimed jurisdictional error. See *id.*, at 1055.

[6] *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941).

after the federal courts had denied review, be deemed voluntary. The Federal District Court surely could not, consistent with our abstention cases and with *England*, send a litigant who properly invoked federal jurisdiction to state court instead for an interpretation of the *Federal* Quiet Title Act.

The Court of Appeals, however, found its decision supported by the "general rule" of finality of jurisdictional determinations expressed in *Durfee* v. *Duke*, 375 U. S. 106, 111 (1963): "'A judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the [second] court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.'" 629 F. 2d, at 1056. But nothing in *Durfee* remotely suggests that the District Court should have afforded estoppel effect to the state court's determination that it had jurisdiction in the face of the explicit provision of the Quiet Title Act to the contrary. *Durfee* is simply an application of the normal rules of collateral estoppel to jurisdictional determinations. The *England* procedure meets precisely the situation here, or alternatively is a clear exception to the "general rule" stated in *Durfee*.[7]

In sum, it is clear that neither the District Court nor the Court of Appeals was bound by the state court's interpretation of the Quiet Title Act nor was either barred from reconsidering that court's decision on the federal question.

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[7] As we noted in *Durfee*, "the general rule of finality of jurisdictional determinations is not without exceptions." 375 U. S., at 114. Surely "the policy against the court's acting beyond its jurisdiction," see Restatement of Conflict of Laws § 451(2)(e) (Supp. 1948), cited in *Durfee*, 375 U. S., at 114, n. 12, is at a maximum where the plaintiff has been erroneously forced from the federal forum where he initiated his suit. Moreover, *Durfee* recognized specifically that "[d]octrines of federal pre-emption or sovereign immunity may in some contexts be controlling." *Id.*, at 114.

Will v. *Calvert Fire Ins. Co.*, 437 U. S. 655, 666 (1978), reserved the question, presented in this case, whether a federal court ever has the power to stay a proceeding in which it has exclusive jurisdiction, pending resolution of a state case. However, at this stage in the present case there is no reason to answer that question.

When Congress speaks definitively, as it has in the Quiet Title Act, state courts may not act to obstruct or unsettle the congressional design. Rather, the federal courts were required to enforce the Quiet Title Act, and since that Act preempted the state court's jurisdiction, petitioners were entitled to an opportunity to establish in the District Court, with federal discovery rules and federal procedures, that they had a superior claim to the disputed land. I would grant the writ for certiorari, reverse the judgment of the Court of Appeals, and remand for further proceedings, or, at the least, grant certiorari and set the case for oral argument.

No. 81–198. INSURANCE COMPANY OF NORTH AMERICA *v.* FORTY-EIGHT INSULATIONS, INC., ET AL.; and

No. 81–199. LIBERTY MUTUAL INSURANCE CO. *v.* FORTY-EIGHT INSULATIONS, INC., ET AL. C. A. 6th Cir. Motions of Walbrook Insurance Co., Ltd., et al.; Alliance of American Insurers; Hartford Accident & Indemnity Co.; Keene Corp.; Armstrong World Industries, Inc., et al.; and American Home Assurance Co. et al. for leave to file briefs as *amici curiae* granted. Motion of petitioner in No. 81–198 to defer consideration of the petitions for writs of certiorari denied. Certiorari denied. JUSTICE BRENNAN and JUSTICE O'CONNOR took no part in the consideration or decision of these motions and these petitions. Reported below: 633 F. 2d 1212 and 657 F. 2d 814.

No. 81–200. AETNA CASUALTY & SURETY CO. *v.* PORTER ET AL. C. A. 5th Cir. Motion of American Home Assurance Co. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE BRENNAN and JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this petition. Reported below: 641 F. 2d 1128.

No. 81–313. OLIVER, WARDEN, ET AL. *v.* HARRIS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 645 F. 2d 327.

No. 81–499. MOBIL OIL CORP. *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Motion of Texas City Refining, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BRENNAN would grant certiorari. The order heretofore entered by JUSTICE BRENNAN on September 3, 1981, is vacated. Reported below: 659 F. 2d 150.

No. 81–536. KIMBLE *v.* D. J. MCDUFFY, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 648 F. 2d 340.

JUSTICE WHITE, dissenting.

The first part of 42 U. S. C. § 1985(2) (1976 ed., Supp. III) creates a private right of action for damages based on certain forms of interference with federal judicial proceedings:

> "If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified."

The second part of § 1985(2) creates a similar cause of action for interference with state proceedings:

> "[I]f two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws."

These two clauses are separated by a semicolon: The lower federal courts have reached conflicting conclusions concerning the effect of that semicolon.

Petitioner was employed as an oil driller by respondent D. J. McDuffy, Inc., from December 1972 until April 1973. In March 1973, McDuffy joined the Industrial Foundation of the South (IFS). IFS is a nonprofit corporation, the purpose of which is to provide information to its members concerning workers' compensation claims and personal injury lawsuits in state and federal courts filed by employees or prospective employees of the employer/members. Apparently, the employer/members believe that they can reduce their employers' insurance and workers' compensation costs by obtaining this information, which may indicate whether a particular employee is likely to be an insurance or compensation risk.

Petitioner alleges that when McDuffy joined IFS, McDuffy learned that petitioner had previously pursued a lawsuit in federal court against a former employer and had obtained a large judgment. Contending that he was fired by McDuffy because of this prior suit, petitioner filed a class action in Federal District Court on behalf of all individuals who had been denied employment by IFS members because they had filed workers' compensation or personal injury claims against companies in the oil drilling business.[1] The complaint, based entirely on 42 U. S. C. § 1985(2) (1976 ed., Supp. III), sought damages for the class and a permanent injunction enjoining the challenged practices.[2] The District Court granted respondents' motion for summary judgment. It held that the complaint failed to allege facts that would bring this case within either the first or second clause of § 1985(2): A conspiracy by employers to retaliate against employees for filing personal injury suits fails to allege either an intent to deny the equal protection of the laws—required by the second clause—or injury for "having *attended* or *testified* in federal court," 445 F. Supp. 269, 276 (ED La. 1978)—required by the first clause. A divided panel of the Court of Appeals for

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[1] Besides McDuffy, the defendants included IFS and all its members.

[2] The District Court certified a class only with respect to the claim for injunctive relief.

the Fifth Circuit reversed in part. 623 F. 2d 1060 (1980). It held that under the first clause of § 1985(2)—that part of the statute applicable to interference with federal, as opposed to state, court proceedings—there is no requirement of discriminatory animus and that the scope of the term "attended" includes the filing of a complaint in federal court. A petition for rehearing en banc was granted and a severely divided Court of Appeals affirmed the District Court. 648 F. 2d 340 (1981).

By a vote of 11 to 10,[3] the court held that the language of the statute is not as important as its history. Thus, the fact that the phrase "equal protection of the laws" is included in the second, but not the first, part of § 1985(2) is not as relevant to the proper interpretation of the statute as is the fact that all of § 1985(2) is derived from the Ku Klux Act of 1871. Relying in part on this Court's decision in *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971), the majority held that an action under § 1985(2) must allege a racial or class-based animus. The dissent argued both that *Griffin* was inapplicable because it dealt only with § 1985(3) and that the intent of the Ku Klux Act of 1871 was broader than the majority suggested: "A major concern was restoration of civil authority and preservation of orderly government, including federal court ability to proceed without improper interference." 648 F. 2d, at 350. In their view, the second clause of § 1985(2) included the equal protection language because Congress was concerned about the constitutional source of its power to create federal jurisdiction over state torts or crimes. Because Congress had no similar concern over its authority to protect federal-court proceedings, there was no reason for a similar limitation on the first part of the statute.

This dispute over the scope of § 1985(2) has divided not only the judges of the Fifth Circuit, but various other Federal Courts of Appeals as well. The argument of the dissent

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[3] Judge Clark concurred in the majority's decision, but stated that it was not necessary to reach this issue.

below was derived largely from *McCord* v. *Bailey*, 204 U. S. App. D. C. 334, 636 F. 2d 606 (1980). That court held that "a class-based, invidiously discriminatory intent is [not] an element of a cause of action under the first clause of section 1985(2)." *Id.*, at 342, 636 F. 2d, at 614. The Court of Appeals for the Third Circuit reached a similar conclusion in *Brawer* v. *Horowitz*, 535 F. 2d 830, 840 (1976):

> "The first half of § 1985(2) aims at conspiracies the object of which is intimidation of or retaliation against parties or witnesses . . . in any court of the United States. The federal nexus, then, is not the class-based, invidiously discriminatory animus required by the second half of the subsection, but the connection of the proscribed activities to a federal court."

On the other hand, the Court of Appeals for the Eighth Circuit agrees with the position taken by the Fifth Circuit in this case: "the racial or class-based discrimination rationale expressed by the Supreme Court in *Griffin* v. *Breckenridge*, 403 U. S. 88, 101–102 [(1971),] applies equally to [§ 1985(2)]." *Jones* v. *United States*, 536 F. 2d 269, 271 (1976).

In order to settle this conflict in the Circuits over the scope of a federal remedy for interference with the federal judicial process, I would grant the petition and set the case for plenary consideration.[4]

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[4] An alternative ground for the decision below was the majority's reversal of the panel's holding that the filing of a complaint in federal district court falls within the scope of the term "attending" as used in the statute. The fact that the Court of Appeals could have relied solely on this ground to reverse the panel decision does not mitigate the precedential effect of its holding that invidious discrimination must be alleged to state a cause of action under § 1985(2), nor does it lessen the conflict in the Circuits:

"It does not make a reason given for a conclusion in a case *obiter dictum* that it is only one of two reasons given for the same conclusion. . . . [W]e can not hold that the use of the section in the opinion is not to be regarded as authority except by directly reversing the decision in that case on that point." *Richmond Co.* v. *United States*, 275 U. S. 331, 340 (1928).

See also *Massachusetts* v. *United States*, 333 U. S. 611, 623 (1948); *United States* v. *Title Ins. Co.*, 265 U. S. 472, 486 (1924); *Union Pacific R. Co.* v.

No. 81–816. MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE ET AL. *v.* NEWFIELD HOUSE, INC., ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 651 F. 2d 32.

No. 81–5478. HARDY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 247 Ga. 235, 275 S. E. 2d 319.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Last Term, this Court granted petitioner's previous petition for certiorari, vacated the judgment of the Georgia Supreme Court affirming the death sentence, and remanded the case for further consideration in light of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). See 449 U. S. 988 (1980). On remand, without the benefit of full briefing and argument requested by petitioner, the State Supreme Court reaffirmed petitioner's death sentence. Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth Amendment, I would grant the petition for certiorari in this case and vacate the judgment

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Mason City & Fort Dodge R. Co., 199 U. S. 160, 166 (1905). In any case, the intended scope of the term "attending" can only be determined by reviewing the same legislative history as is involved in resolving the question of whether an action under § 1985(2) must allege class-based discrimination. Because these two questions are so related, I would grant review of petitioner's second question as well: Whether the term "attending" includes the filing of a claim in federal court. I would not, however, grant review of petitioner's third question: Whether offshore workers constitute a "discrete class" for equal protection purposes.

below insofar as it leaves undisturbed the death sentence. Moreover, even assuming, *arguendo*, that there are circumstances in which the death penalty may be constitutionally imposed, I believe that the State Supreme Court ignored the mandate of this Court by reaffirming the death sentence in this case. Therefore, essentially for the reasons stated in my dissent from the denial of certiorari in *Davis* v. *Georgia*, *Spraggins* v. *Georgia*, and *Brooks* v. *Georgia*, 451 U. S. 921 (1981), I would grant the petition for certiorari and vacate the judgment below on this additional ground.

Petitioner in this case was sentenced to death after the jury found that the offense of murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" pursuant to Ga. Code § 27–2534.1(b)(7) (1978).* In *Godfrey* v. *Georgia*, *supra*, this Court recognized that this statutory language is so broad that it invites the jury to impose the death sentence in every murder case. In *Godfrey*, both the plurality opinion and the opinion concurring in the judgment explained that a State's capital punishment scheme "must channel the *sentencer's* discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" 446 U. S., at 428 (emphasis added) (citations omitted). See *id.*, at 437 (MARSHALL, J., concurring in judgment). Under Georgia law, the jury is responsible for sentencing in death penalty cases. Because the Georgia

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*The jury also found, pursuant to the trial court's charge, a nonstatutory aggravating circumstance—that the offense of murder was committed while the offender was engaged in the commission of a robbery. Although the State Supreme Court recognized that the jury could not impose a sentence of death based on a nonstatutory circumstance, it found no error in the jury's consideration of this circumstance, and affirmed the death sentence because the jury had found the statutory aggravating circumstance beyond a reasonable doubt.

courts had failed to provide the requisite guidance to the sentencing juries, the *Godfrey* plurality reasoned that the death sentence imposed there had to be vacated.

Following *Godfrey*, we vacated the judgments in this and several other cases where the death sentence had been imposed after the jury found this statutory aggravating circumstance. On remand, the State Supreme Court has employed the same procedure: it reviews the record to determine whether, *if properly instructed*, the jury *could have* found this aggravating circumstance beyond a reasonable doubt. I continue to believe that under *Godfrey*, it is the discretion of the sentencer—in this case the jury—that must be properly narrowed; an appellate court can do no more than guess at what a properly instructed jury might have done. Therefore, I believe that only a new sentencing hearing before a properly instructed jury can accomplish the purpose of our remand for further consideration in light of *Godfrey*. This is particularly true under Georgia law because, even where the jury finds an aggravating circumstance, it retains the ultimate discretion to refuse to impose the death penalty at all. The procedure employed by the State Supreme Court substitutes that court's own judgment for that of the sentencer, and is contrary to the mandate of this Court. Therefore, I would grant the petition for certiorari and vacate the judgment below on this additional ground.

Rehearing Denied

No. 80–6682. SPANGENBERG *v.* WELLS FARGO BANK, N. A., *ante*, p. 843. Motion for leave to file petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 80–6699. NOVEL *v.* CIVIL COURT OF THE CITY OF NEW YORK ET AL., *ante*, p. 844; and

No. 80–6917. JOHNSON *v.* GULF COAST COMMUNITY SERVICE ASSN. ET AL., *ante*, p. 856. Petitions for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

No. 80–1994. NASH COUNTY BOARD OF EDUCATION *v.* BILTMORE CO. ET AL., *ante*, p. 878;

No. 80–2114. LOCHIATTO ET AL. *v.* FLORIDA, *ante*, p. 880;

No. 81–98. COOK ET AL. *v.* UNITED STATES, *ante*, p. 894;

No. 81–112. MICHAEL *v.* UNITED STATES, *ante*, p. 950;

No. 81–284. CAMPBELL *v.* WASHINGTON ET AL., *ante*, p. 897;

No. 81–368. RADIO BROADCASTING CO. *v.* FRANKLIN TOWN CORP. ET AL., *ante*, p. 941;

No. 81–443. NICHOLLS *v.* NASH ET AL., *ante*, p. 942;

No. 81–5129. DEFALCO *v.* UNITED STATES, *ante*, p. 942;

No. 81–5132. BUSSE *v.* UNITED STATES, *ante*, p. 971;

No. 81–5336. MARTIN *v.* NORTH CAROLINA, *ante*, p. 933; and

No. 81–5372. BARFIELD *v.* NORTH CAROLINA, *ante*, p. 957. Petitions for rehearing denied.

DECEMBER 11, 1981

Miscellaneous Order

No. A–480 (81–1042). CLEMENTS ET AL. *v.* LOGAN. C. A. 4th Cir. Application for stay, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied. The temporary stay order heretofore entered by JUSTICE REHNQUIST on December 9, 1981 [*post*, p. 1304], is vacated.

DECEMBER 14, 1981

Appeals Dismissed

No. 81–367. NEILSON *v.* OKLAHOMA. Appeal from Ct. Crim. App. Okla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 639 P. 2d 615.

No. 81–734. CENTRAL AVENUE NEWS, INC., ET AL. *v.* CITY OF MINOT ET AL. Appeal from Sup. Ct. N. D. dismissed for want of substantial federal question. Reported below: 308 N. W. 2d 851.

No. 81–5499. COHEN *v.* NEW YORK CITY BOARD OF EDUCATION ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 54 N. Y. 2d 659, 426 N. E. 2d 177.

No. 81–5621. JOHNSON *v.* AETNA CASUALTY & SURETY COMPANY OF HARTFORD, CONNECTICUT, ET AL. Appeal from Sup. Ct. Wyo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 630 P. 2d 514.

Certiorari Granted—Vacated and Remanded

No. 81–176. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM *v.* SECURITY BANCORP ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated as moot, and case remanded to the Court of Appeals with instructions to remand the case to the Board of Governors of the Federal Reserve System to vacate the administrative decision. Reported below: 655 F. 2d 164.

No. 81–272. LAVALLEY ET AL. *v.* NORTHWOOD APARTMENTS. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Fair Assessment in Real Estate Assn.* v. *McNary*, *ante*, p. 100. Reported below: 649 F. 2d 401.

No. 81–5134. BARKSDALE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. The order of dismissal is vacated and the case is remanded for further consideration in light of the position presently asserted by the Attorney General of Louisiana and the District Attorney for the Parish of Orleans in their memorandum filed November 2, 1981. Reported below: 647 F. 2d 630.

Certiorari Granted—Reversed. (See No. 81–17, *ante*, p. 339.)

Miscellaneous Orders

No. A–479. CAPPAERT ENTERPRISES *v.* CITIZENS & SOUTHERN INTERNATIONAL BANK OF NEW ORLEANS. C. A. 5th Cir. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–509 (81–954). FIRST PENTECOSTAL CHURCH *v.* UNITED STATES. C. A. 5th Cir. Application for stay and recall of mandate, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied.

No. 83, Orig. MARYLAND ET AL. *v.* LOUISIANA. Motion of the Special Master to be discharged is granted, and it is ordered that John F. Davis, Esquire, be discharged as Special Master. JUSTICE POWELL took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, *ante*, p. 809.]

No. 80–1002. BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, ET AL. *v.* ROWLEY, BY HER PARENTS, ROWLEY ET UX. C. A. 2d Cir. [Certiorari granted, *ante*, p. 961.] Motion of petitioners for divided argument and for additional time for oral argument denied.

No. 80–1045. JACKSONVILLE BULK TERMINALS, INC., ET AL. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN. ET AL. C. A. 5th Cir. [Certiorari granted, 450 U. S. 1029]; and

No. 80–1663. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. *v.* ALLIED INTERNATIONAL, INC. C. A. 1st Cir. [Certiorari granted, *ante*, p. 814.] Motion of International Longshoremen's Association et al. for divided argument to permit American Federation of Labor and Congress of Industrial Organizations to present oral argument as *amicus curiae* denied.

No. 80–1190. PULLMAN-STANDARD, A DIVISION OF PULLMAN, INC. *v.* SWINT ET AL.; and

No. 80–1193. UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. *v.* SWINT ET AL. C. A. 5th Cir. [Certiorari granted, 451 U. S. 906.] Motion of petitioners for divided argument denied.

No. 80–1798. WOELKE & ROMERO FRAMING, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.;

No. 80–1808. PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 81–91. OREGON-COLUMBIA CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 814.] Motion of the parties for divided argument and for additional time for oral argument granted, and a total of 1 hour and 20 minutes allotted for oral argument to be divided as follows: Woelke & Romero Framing, Inc., 20 minutes; National Labor Relations Board, 20 minutes; respondent unions, 20 minutes; and petitioners in Nos. 80–1808 and 81–91, 20 minutes.

No. 80–2150. FINNEGAN ET AL. *v.* LEU ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 813.] Motion of Association for Union Democracy et al. for leave to file a brief as *amici curiae* granted.

No. 80–2182. INWOOD LABORATORIES, INC., ET AL. *v.* IVES LABORATORIES, INC.; and

No. 81–11. DARBY DRUG CO., INC., ET AL. *v.* IVES LABORATORIES, INC. C. A. 2d Cir. [Certiorari granted, *ante*, p. 891.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument granted, and 10 additional minutes allotted for that purpose. Motion of petitioners for divided argument denied.

No. 81–1. GOLDSBORO CHRISTIAN SCHOOLS, INC. *v.* UNITED STATES; and

No. 81–3. BOB JONES UNIVERSITY *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, *ante*, p. 892.] Motion of Goldsboro Christian Schools, Inc., for divided argument and for additional time for oral argument denied. Motion of Trent Lott for leave to file a brief as *amicus curiae* in No. 81–3 granted.

No. 81–349. CHICAGO BRIDGE & IRON CO. *v.* CATERPILLAR TRACTOR CO. ET AL. Sup. Ct. Ill. [Probable jurisdiction noted, *ante*, p. 1029.] Motion of appellees for additional time for oral argument denied. Motion of appellees for divided argument granted. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 81–614. GRIFFIN *v.* OCEANIC CONTRACTORS, INC. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1052.] Motion of petitioner for leave to proceed further herein as a seaman granted.

No. 81–792. HINDS ET AL. *v.* CONSOLIDATED RAIL CORP. ET AL. Sp. Ct. R. R. R. A. Motion of petitioners to expedite consideration of the petition and set case for argument in tandem with No. 81–213, *Schweiker, Secretary of Health and Human Services* v. *Hogan et al.* [probable jurisdiction noted, *ante*, p. 891], denied.

No. 81–1068. RYAN ET AL. *v.* OTTO ET AL. D. C. N. D. Ill. Appellees are directed to file motions to dismiss or affirm on or before December 31, 1981. In all other respects, the motion of appellants to expedite is denied. JUSTICE MARSHALL dissents and would deny the motion to expedite.

No. 81–5632. IN RE DOWNS. Petition for writ of mandamus denied.

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No. 81–5114. TIBBS *v.* FLORIDA. Sup. Ct. Fla. [Certiorari granted, *ante*, p. 963.] Motion of Michael A. Palecki to permit Deborah A. Osmond, of Tampa, Fla., to present oral argument *pro hac vice* granted.

Probable Jurisdiction Noted

No. 81–776. BROWN ET AL. *v.* SOCIALIST WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL. Appeal from D. C. S. D. Ohio. Probable jurisdiction noted.

No. 81–184. UNITED STATES *v.* SECURITY INDUSTRIAL BANK ET AL. Appeal from C. A. 10th Cir. Motion of Beneficial Finance of Kansas, Inc., to consolidate this case with No. 81–150, *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co. et al.* [probable jurisdiction noted, *ante*, p. 1029]; No. 81–546, *United States* v. *Marathon Pipe Line Co. et al.* [probable jurisdiction noted, *ante*, p. 1029]; and No. 81–583, *Beneficial Finance of Kansas, Inc.* v. *United States et al.*, denied. Probable jurisdiction noted. Reported below: 642 F. 2d 1193.

No. 81–770. BLUM, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* BACON ET AL. Appeal from C. A. 2d Cir. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 648 F. 2d 801.

Certiorari Granted

No. 81–451. HATHORN ET AL. *v.* LOVORN ET AL. Sup. Ct. Miss. Certiorari granted. Reported below: 399 So. 2d 1356.

No. 81–534. O'DELL ET AL. *v.* ESPINOZA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ESPINOZA AND AS GUARDIAN, ET AL. Sup. Ct. Colo. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 633 P. 2d 455.

Certiorari Denied. (See also Nos. 81–367, 81–5499, and 81–5621, *supra.*)

No. 80–1396. BRANDON ET AL. *v.* BOARD OF EDUCATION OF GUILDERLAND SCHOOL DISTRICT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 635 F. 2d 971.

No. 81–194. NDM CORP. *v.* HAYES PRODUCT, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 641 F. 2d 1274.

No. 81–301. ILLINOIS HEALTH SERVICE, INC., DBA BARCLAY HOSPITAL *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 657 F. 2d 271.

No. 81–327. CARLSON MOORING SERVICE ET AL. *v.* LANDRY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 643 F. 2d 1080.

No. 81–399. STANDARD REGISTER CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 649 F. 2d 412.

No. 81–474. NORTH CAMBRIA FUEL CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 645 F. 2d 177.

No. 81–513. MACKOWSKI *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 81–545. TRAVELERS INSURANCE CO. *v.* FENASCI, ADMINISTRATRIX, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 986.

No. 81–557. MIDDLEBROOK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 775.

No. 81–667. WHELAN *v.* ROBBINS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 653 F. 2d 47.

No. 81–549. MICHIGAN ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 623 F. 2d 448 and 653 F. 2d 277.

No. 81–626. BRANCADORA *v.* FEDERAL NATIONAL MORTGAGE ASSN. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 61.

No. 81–657. FORMAN *v.* CITY OF NEW ORLEANS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 775.

No. 81–694. CAIN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 653 F. 2d 883.

No. 81–733. CITIES SERVICE GAS CO. ET AL. *v.* OKLAHOMA TAX COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 656 F. 2d 584.

No. 81–735. UNION PLANTERS NATIONAL BANK OF MEMPHIS *v.* COMMERCIAL CREDIT BUSINESS LOANS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 651 F. 2d 1174.

No. 81–745. VALENTINE *v.* SMITH, INTERIM PRESIDENT OF ARKANSAS STATE UNIVERSITY, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 654 F. 2d 503.

No. 81–758. JENKINS, ADMINISTRATRIX *v.* KREIGER, SHERIFF OF CUYAHOGA COUNTY. Sup. Ct. Ohio. Certiorari denied. Reported below: 67 Ohio St. 2d 314, 423 N. E. 2d 856.

No. 81–759. CHECKPOINT SYSTEMS, INC. *v.* KNOGO CORP. Ct. Cl. Certiorari denied. Reported below: 228 Ct. Cl. 372, 656 F. 2d 655.

No. 81–766. UNDERWOOD *v.* SECURITES AND EXCHANGE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 650 F. 2d 718.

No. 81–768. PACHKOFSKY *v.* OREGON, BY AND THROUGH THE PORT OF PORTLAND, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1089.

No. 81–771. STEPANENKO *v.* VAN TASSEL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 2d 915.

No. 81–777. WARDER ET AL. *v.* BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 53 N. Y. 2d 186, 423 N. E. 2d 352.

No. 81–784. PICKETT ET AL., CO-EXECUTORS AND TRUSTEES *v.* REPUBLIC NATIONAL BANK OF DALLAS, TRUSTEE. Sup. Ct. Tex. Certiorari denied. Reported below: 619 S. W. 2d 399.

No. 81–785. C. A. MAY MARINE SUPPLY CO. *v.* BRUNSWICK CORP. C. A. 11th Cir. Certiorari denied. Reported below: 649 F. 2d 1049.

No. 81–787. FOLKERTS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 229 Kan. 608, 629 P. 2d 173.

No. 81–800. RILEY *v.* UNIVERSITY OF LOWELL ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 651 F. 2d 822.

No. 81–869. KALMANOVITZ *v.* GUTTING ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 63.

No. 81–874. MARATHON OIL CO. ET AL. *v.* MALCOLM, FORMERLY DBA SPAR OIL CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 642 F. 2d 845 and 651 F. 2d 1016.

No. 81–880. LEONARD ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 942.

No. 81–883. JONES *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 49 Md. App. 736.

No. 81–887. HOWARD *v.* COLORADO ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–889. HARRISON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 651 F. 2d 353.

No. 81–913. VALERIO ET AL. *v.* BOISE CASCADE CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 645 F. 2d 699.

No. 81–919. MARTENS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 901.

No. 81–946. NESS *v.* UNITED STATES; SWAIN *v.* UNITED STATES; and PITT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 890 (first case); 659 F. 2d 1091 (second and third cases).

No. 81–948. MENIUS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 667 F. 2d 1024.

No. 81–5204. BRYAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 645 F. 2d 842.

No. 81–5396. ALLEN ET AL. *v.* PIERCE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 2d 913.

No. 81–5435. NOE *v.* METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 2d 434.

No. 81–5441. BROWN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 82 App. Div. 2d 1018, 441 N. Y. S. 2d 757.

No. 81–5461. VAN SCOY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 654 F. 2d 257.

No. 81–5557. GITLITZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 652 F. 2d 998.

No. 81–5618. MONTGOMERY *v.* HARGREAVES, CIRCUIT JUDGE OF OREGON FOR THE COUNTY OF LANE. Sup. Ct. Ore. Certiorari denied.

No. 81–5619. MASSENGALE, EXECUTOR *v.* INTERNAL REVENUE SERVICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 211 U. S. App. D. C. 311, 656 F. 2d 900.

No. 81–5620. GATES *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 81–5650. YOUNG *v.* RALSTON, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 81–5686. ANDERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 654 F. 2d 1264.

No. 81–5701. FRANK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 658 F. 2d 1103.

No. 81–5705. GREEN *v.* CLEMMONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 665 F. 2d 1044.

No. 81–5727. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 661 F. 2d 855.

No. 81–5728. DONDICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 646 F. 2d 369.

No. 81–5730. COLMENARES-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 39.

No. 81–5741. JACKSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 424 A. 2d 40.

No. 81–5743. GREER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 80–1592. PAIN, PERSONAL REPRESENTATIVE OF THE ESTATE OF PAIN, ET AL. *v.* UNITED TECHNOLOGIES CORP. C. A. D. C. Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 205 U. S. App. D. C. 229, 637 F. 2d 775.

No. 81–778. SOUTHERN RAILWAY CO. ET AL. *v.* WILLIAMS ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 658 F. 2d 430.

No. 80–1882. CHAPMAN ET AL. *v.* DOW CHEMICAL CO. ET AL. C. A. 2d Cir. Motion of Ryan Family et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE BLACKMUN and JUSTICE O'CONNOR would grant certiorari. Reported below: 635 F. 2d 987.

No. 81–598. AUSTIN *v.* TENNESSEE. Sup. Ct. Tenn.; and

No. 81–5390. SMITH *v.* MORRIS. Sup. Ct. Va. Certiorari denied. Reported below: No. 81–598, 618 S. W. 2d 738; No. 81–5390, 221 Va. cxliii.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 81–769. CANNON *v.* UNIVERSITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 648 F. 2d 1104.

No. 81–842. HOLMAN *v.* NATIONAL RAILROAD PASSENGER CORPORATION, AKA AMTRAK. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 661 F. 2d 914.

No. 81–5755. MCNICHOLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 293.

No. 81–790. SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY *v.* CAMERA. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 658 F. 2d 80.

Rehearing Denied

No. 80–1810. VALMAS BROTHERS SHIPPING, S. A., ET AL. *v.* FISHER ET AL., *ante*, p. 816;

No. 81–365. EA INDUSTRIES, INC. *v.* AMI INDUSTRIES, INC., *ante*, p. 952;

No. 81–5374. HIGGINS *v.* CHARACTER AND FITNESS COMMITTEE, FOURTH DEPARTMENT, NEW YORK SUPREME COURT, *ante*, p. 972;

No. 81–5386. ROGERS *v.* JINKS ET AL., *ante*, p. 959;

No. 81–5434. ALLARD *v.* IMMIGRATION AND NATURALIZATION SERVICE, *ante*, p. 974;

No. 81–5438. IN RE KULWIEC, *ante*, p. 961;

No. 81–5468. SPRECHER *v.* UNITED STATES, *ante*, p. 944; and

No. 81–5470. WOODS *v.* SOUTH CAROLINA, *ante*, p. 1058. Petitions for rehearing denied.

No. 80–1622. GROTE *v.* UNITED STATES, *ante*, p. 819;

No. 80–2126. HUNT *v.* HUNT, EXECUTOR, *ante*, p. 834;

No. 80–2136. WEBER *v.* BLACK ET AL., *ante*, p. 834; and

No. 81–5425. PIERCE *v.* VOLKSWAGEN OF AMERICA, INC., *ante*, p. 1048. Petitions for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

No. 81–5109. RUCKER *v.* REGAN, SECRETARY OF THE TREASURY, *ante*, p. 871. Motion for leave to file petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

DECEMBER 18, 1981

Dismissal Under Rule 53

No. 81–412. WILSON *v.* SCRIPPS-HOWARD BROADCASTING CO., DBA WMC TV CHANNEL 5. C. A. 6th Cir. [Certiorari granted, *ante*, p. 962.] Stipulation to dismiss the writ of certiorari was filed, and the case was dismissed pursuant to this Court's Rule 53.

JANUARY 5, 1982

Dismissal Under Rule 53

No. 81–928. C. ITOH & CO. (AMERICA), INC. *v.* SPIESS ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 643 F. 2d 353.

JANUARY 11, 1982

Affirmed on Appeal

No. 80–970. FIRESTONE, SECRETARY OF STATE OF FLORIDA, ET AL. *v.* LET'S HELP FLORIDA ET AL. Affirmed on appeal from C. A. 5th Cir. Reported below: 621 F. 2d 195.

No. 81–1068. RYAN ET AL. *v.* OTTO ET AL.; and

No. 81–1077. MCCLORY *v.* OTTO ET AL. Affirmed on appeals from D. C. N. D. Ill.

Appeals Dismissed

No. 80–1945. ARMED FORCES COOPERATIVE INSURING ASSN. *v.* DEPARTMENT OF INSURANCE OF WYOMING. Appeal from Sup. Ct. Wyo. dismissed for want of substantial federal question. JUSTICE BLACKMUN would postpone further consideration of question of jurisdiction to a hearing of the case on the merits. Reported below: 622 P. 2d 1318.

No. 80–2056. F/V AMERICAN EAGLE *v.* ALASKA. Appeal from Sup. Ct. Alaska dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 620 P. 2d 657.

No. 81–219. FIRST WEST VIRGINIA BANCORP., INC., ET AL. *v.* SECURITY NATIONAL BANK & TRUST CO. ET AL. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question. Reported below: —— W. Va. ——, 277 S. E. 2d 613.

No. 81–504. SJONG *v.* ALASKA. Appeal from Sup. Ct. Alaska dismissed for want of substantial federal question. Reported below: 622 P. 2d 967.

No. 81–5640. SPIKES *v.* OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 67 Ohio St. 2d 405, 423 N. E. 2d 1122.

No. 81–293. VAN EMMERIK *v.* JANKLOW, GOVERNOR OF SOUTH DAKOTA, ET AL. Appeal from Sup. Ct. S. D. dismissed for want of substantial federal question. Reported below: 304 N. W. 2d 700.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

Appellant instituted this action to challenge the constitutionality of Senate Bill 40, 1981 S. D. Laws, ch. 102, pp. 243–245, an Act of the South Dakota Legislature which, *inter alia*, retroactively increased the sales tax on utility services. Beginning in 1967, South Dakota imposed a 3-percent tax on utility services. S. D. Comp. Laws Ann. § 10–45–6 (1967). Retail occupational sales and use taxes were increased to 4 percent in 1969, 1969 S. D. Laws, ch. 267, § 1, pp. 366–367, and the State then began to collect sales taxes from utility companies at a rate of 4 percent. Utilities from which the tax was collected sought refunds from the State, and the Supreme Court of South Dakota held that the sales tax on utility services was not changed by the 1969 legislation and that the utilities were entitled to a credit or refund. *In re Sales Tax Refund Applications*, 298 N. W. 2d 799 (1980). Meanwhile, appellant brought a class action against the State and the utility companies on behalf of all South Dakota residents who paid sales taxes in excess of the legal rate on their utility

bills. The Supreme Court ruled that the action against the State was barred by the doctrine of sovereign immunity, but that appellant was entitled to seek derivative relief from the utility companies. *Van Emmerik* v. *State*, 298 N.W. 2d 804 (1980). The legislature then enacted and the Governor approved Senate Bill 40, effective January 30, 1981, which imposed a 4-percent tax on utility services retroactive to 1969. Appellant immediately filed this suit challenging the constitutionality of the statute on due process and Contract Clause grounds and seeking an order to prevent its enforcement and to require the State to refund excess taxes. Relying principally on *United States* v. *Heinszen & Co.*, 206 U. S. 370 (1907), and *Forbes Pioneer Boat Line* v. *Board of Comm'rs*, 258 U. S. 338 (1922), the Supreme Court held, among other things, that the statute does not violate due process because it is a "curative act." 304 N.W. 2d 700, 703 (1981).

The difficulty in discerning the difference between permissible curative legislation and unconstitutionally retroactive legislation is apparent from an examination of our cases. A leading example of curative legislation is found in *United States* v. *Heinszen*, *supra*. There a tariff was imposed on goods coming into the Philippines beginning in 1898 when the islands came under the military control of the United States. The treaty ending the Spanish-American War was ratified in 1899, and the Government continued to collect the same tariff. Congress approved and continued the tariff in 1902. After this Court held that there was no authority to collect the tariff from 1899 to 1902, *Lincoln* v. *United States*, 202 U. S. 484 (1906), Congress enacted legislation legalizing and ratifying the collection of duties from 1899 to 1902. We held the legislation valid, reasoning that the legislature may "'cure irregularities, and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights.'" *United States* v. *Heinszen*, *supra*, at 384, quoting *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690 (1878).

Government officials also collected certain charges while believing they were authorized to do so in *Forbes Pioneer Boat Line* v. *Board of Comm'rs*, *supra*. There the Board of Commissioners believed they were authorized by statute to collect tolls from boats using a Florida canal. The Florida Supreme Court later held that the Board was without authority to collect the tolls, and the Florida Legislature passed a statute purporting to validate the collection of the tolls retroactively. We held the statute unconstitutional, rejecting the analogy to *United States* v. *Heinszen*, *supra*, and finding that the legislature's failure to impose tolls at an earlier date barred the legislature from depriving the plaintiff of his right to a refund.

Heinszen and *Forbes* appear to stand for the proposition that administrative, procedural, and technical defects unrelated to the underlying policy may be remedied by curative legislation, while legislative policy may not be changed retroactively. However, *Heinszen* and *Forbes* offer little guidance as to whether a retroactive tax increase constitutes a change in legislative policy. For example, the Court of Appeals of Maryland reached the opposite result from that reached by the lower court in this case when confronted with a similar retroactive tax increase. In *Washington National Arena Limited Partnership* v. *Treasurer*, 287 Md. 38, 54, 410 A. 2d 1060, 1069, cert. denied, 449 U. S. 834 (1980), the court held that a retroactive increase in recordation taxes was "wholly inconsistent with the policy set forth in the controlling State statute," and the petitioners, like the claimants in *Forbes*, were entitled to refunds as a matter of federal constitutional right.

Just as it is clear that "the principle of curative legislation could, if carried too far, encourage irresponsible official conduct,"* it is also clear that it is this Court's duty to define

*Slawson, Constitutional and Legislative Considerations in Retroactive Lawmaking, 48 Calif. L. Rev. 216, 239 (1960).

the boundary between permissible and impermissible retroactive tax increases. The question is hardly insubstantial, the lower courts are in conflict, and the Court's prior cases fail to furnish adequate guidance. I would note probable jurisdiction and set the case for plenary consideration.

No. 81–712. BLALOCK ET AL. *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. JUSTICE BRENNAN would postpone further consideration of question of jurisdiction to a hearing of the case on the merits. Reported below: 398 So. 2d 1369.

No. 81–743. COWGILL ET AL. *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. JUSTICE BRENNAN would postpone further consideration of question of jurisdiction to a hearing of the case on the merits. Reported below: 397 So. 2d 1134.

No. 81–782. WALL ET AL. *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. JUSTICE BRENNAN would postpone further consideration of question of jurisdiction to a hearing of the case on the merits. Reported below: 400 So. 2d 762.

No. 81–5368. CUMMINGS ET AL. *v.* TOWN OF OAKLAND. Appeal from Sup. Jud. Ct. Me. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 430 A. 2d 825.

No. 81–5729. UNITED STATES EX REL. SEVERA *v.* BOARD OF REVIEW OF NEW JERSEY ET AL. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 87 N. J. 435, 434 A. 2d 1103.

No. 81–5641. FISCHETTI *v.* ASCIONE. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 54 N. Y. 2d 603, 426 N. E. 2d 755.

No. 81–5709. WITTNER *v.* CASS COUNTY WELFARE DEPARTMENT ET AL. Appeal from Sup. Ct. Minn. dismissed for want of jurisdiction. JUSTICE BRENNAN and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 309 N. W. 2d 320.

Certiorari Granted—Reversed and Remanded. (See No. 80–6845, *ante*, p. 364; and No. 81–23, *ante*, p. 370.)

Certiorari Granted—Reversed. (See No. 80–1565, *ante*, p. 354.)

Miscellaneous Orders

No. A–505. HENRIQUE *v.* UNITED STATES MARSHAL ET AL. C. A. 9th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–511. GABRIEL *v.* UNITED STATES. Application for bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–530. THOMPSON *v.* UNITED STATES. Application for bail, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. The Final Accounting of the United States, the corrected Final Accounting of the United States, and the Final Accounting of Louisiana are ordered filed. Objections to the Final Accountings are referred to the Special Master. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier proceeding herein, see, *e. g.*, 452 U. S. 726.]

No. 80–1199. AMERICAN TOBACCO CO. ET AL. *v.* PATTERSON ET AL. C. A. 4th Cir. [Certiorari granted, 452 U. S. 937.] Motion of the Solicitor General to permit David A. Strauss, Esquire, to present oral argument *pro hac vice* granted.

No. 80–1257. DONALD SCHRIVER, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 451 U. S. 976. Motion of petitioner for expedited consideration of petition for rehearing denied.

No. 80–1417. MILLS ET AL. *v.* ROGERS ET AL. C. A. 1st Cir. [Certiorari granted *sub nom. Okin* v. *Rogers*, 451 U. S. 906.] Motion of New Jersey Department of the Public Advocate for leave to file *amicus curiae* brief out of time denied.

No. 80–1663. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. *v.* ALLIED INTERNATIONAL, INC. C. A. 1st Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 80–1991. OREGON *v.* KENNEDY. Ct. App. Ore. [Certiorari granted, *ante*, p. 891.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 80–1714. HOPPER, CORRECTIONS COMMISSIONER, ET AL. *v.* EVANS. C. A. 5th Cir. [Certiorari granted *sub nom. Britton* v. *Evans*, 452 U. S. 960.] Motion of respondent to dismiss the writ of certiorari denied.

No. 80–2147. CONNECTICUT ET AL. *v.* TEAL ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 813.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 80–1429. YOUNGBERG, SUPERINTENDENT, PENNHURST STATE SCHOOL AND HOSPITAL, ET AL. *v.* ROMEO, AN INCOMPETENT, BY HIS MOTHER AND NEXT FRIEND, ROMEO. C. A. 3d Cir. [Certiorari granted, 451 U. S. 982.] Motion of Lowell P. Weicker, Jr., et al. for leave to file *amici curiae* brief out of time denied.

No. 80–1765. AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. *v.* HYDROLEVEL CORP. C. A. 2d Cir. [Certiorari granted, 452 U. S. 937.] Motion of Stephen G. Glatzer to reconsider denial of leave to file a brief as *amicus curiae* denied.

No. 80–1798. WOELKE & ROMERO FRAMING, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.;

No. 80–1808. PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 81–91. OREGON-COLUMBIA CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 814.] Motion of Georgia Power Co. for leave to file a brief as *amicus curiae* granted.

No. 80–2100. ROGERS ET AL. *v.* LODGE ET AL. C. A. 5th Cir. [Probable jurisdiction noted, *ante*, p. 811.] Motions of Center for Constitutional Rights et al., Lawyers' Committee for Civil Rights Under Law, Georgia Association of Black Elected Officials et al., and NAACP Legal Defense and Educational Fund, Inc., et al. for leave to file briefs as *amici curiae* granted.

No. 80–2178. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND, ET AL. *v.* MORENO ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 815.] Motion of petitioners for additional time for oral argument denied. Motion of petitioners for divided argument denied.

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No. 80–2195. UNITED STATES *v.* GOODWIN. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1079.] Motion for appointment of counsel granted, and it is ordered that Paul W. Spence, Esquire, of Baltimore, Md., be appointed to serve as counsel for respondent in this case.

No. 81–9. WASHINGTON ET AL. *v.* SEATTLE SCHOOL DISTRICT NO. 1 ET AL. C. A. 9th Cir. [Probable jurisdiction noted, *ante*, p. 890.] Motion of appellees for divided argument denied. Motion of the Solicitor General for divided argument and for additional time for oral argument denied.

No. 81–55. NEW YORK *v.* FERBER. Ct. App. N. Y. [Certiorari granted, *ante*, p. 1052.] Motion of Morality in Media, Inc., for leave to file a brief as *amicus curiae* granted.

No. 81–202. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* CLAIBORNE HARDWARE CO. ET AL. Sup. Ct. Miss. [Certiorari granted, *ante*, p. 1030.] Motions of American Jewish Congress and American Civil Liberties Union et al. for leave to file briefs as *amici curiae* granted. JUSTICE MARSHALL took no part in the consideration or decision of these motions.

No. 81–280. GENERAL BUILDING CONTRACTORS ASSN., INC. *v.* PENNSYLVANIA ET AL.;

No. 81–330. UNITED ENGINEERS & CONSTRUCTORS, INC. *v.* PENNSYLVANIA ET AL.;

No. 81–331. CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA ET AL. *v.* PENNSYLVANIA ET AL.;

No. 81–332. GLASGOW, INC. *v.* PENNSYLVANIA ET AL.; and

No. 81–333. BECHTEL POWER CORP. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 939.] Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 81–184. UNITED STATES *v.* SECURITY INDUSTRIAL BANK ET AL. C. A. 10th Cir. [Probable jurisdiction noted, *ante*, p. 1122.] Motion of appellee Beneficial Finance of Kansas, Inc., to enlarge questions presented denied. Motion of the Solicitor General to defer briefing and oral argument denied.

No. 81–341. GREENE ET AL. *v.* LINDSEY ET AL. C. A. 6th Cir. [Probable jurisdiction noted, *ante*, p. 938.] Motion of Antioch School of Law et al. for leave to file a brief as *amici curiae* granted.

No. 81–806. LORD ET AL. *v.* LOCAL UNION NO. 2088, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. C. A. 11th Cir.; and

No. 81–865. METROCENTRE IMPROVEMENT DISTRICT NO. 1, CITY OF LITTLE ROCK, ARKANSAS *v.* FEDERAL RESERVE BANK OF ST. LOUIS. C. A. 8th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 81–1097. JOHNSON ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Motion of petitioners to expedite consideration of the petition for certiorari denied.

No. 81–5772. IN RE IRVING; and

No. 81–5823. IN RE ALLEN. Petitions for writs of habeas corpus denied.

No. 81–5455. IN RE REYNOLDS;

No. 81–5595. IN RE PIATT;

No. 81–5660. IN RE ALLEN;

No. 81–5695. IN RE MITSKUS; and

No. 81–5710. IN RE MARZANO. Petitions for writs of mandamus denied.

No. 81–1004. IN RE GALAHAD. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 81–554. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* WYOMING ET AL. Appeal from D. C. Wyo. Probable jurisdiction noted. Reported below: 514 F. Supp. 595.

No. 81–878. LARKIN ET AL. *v.* GRENDEL'S DEN, INC. Appeal from C. A. 1st Cir. Probable jurisdiction noted. Reported below: 662 F. 2d 102.

No. 81–741. U. S. MARKETING, INC., ET AL. *v.* IDAHO ET AL. Appeal from Sup. Ct. Idaho. Probable jurisdiction noted limited to Question I presented by the jurisdictional statement. Reported below: 102 Idaho 451, 631 P. 2d 622.

No. 81–896. PERRY EDUCATION ASSN. *v.* PERRY LOCAL EDUCATORS' ASSN. ET AL. Appeal from C. A. 7th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 652 F. 2d 1286.

Certiorari Granted

No. 81–430. ILLINOIS *v.* GATES ET UX. Sup. Ct. Ill. Certiorari granted. Reported below: 85 Ill. 2d 376, 423 N. E. 2d 887.

No. 81–431. GUARDIANS ASSN. ET AL. *v.* CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 633 F. 2d 232.

No. 81–920. VERLINDEN B. V. *v.* CENTRAL BANK OF NIGERIA. C. A. 2d Cir. Certiorari granted. Reported below: 647 F. 2d 320.

No. 81–129. LANDON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE *v.* PLASENCIA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 637 F. 2d 1286.

No. 81–420. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY *v.* LONBERGER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 651 F. 2d 447.

No. 81–298. COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA *v.* GOTTFRIED ET AL. C. A. D. C. Cir. Motion of Corporation for Public Broadcasting et al. for leave to file a brief as *amici curiae* granted. Certiorari granted limited to Question 2 presented by the petition. Reported below: 210 U. S. App. D. C. 184, 655 F. 2d 297.

No. 81–799. FEDERAL COMMUNICATIONS COMMISSION *v.* GOTTFRIED ET AL. C. A. D. C. Cir. Motion of Corporation for Public Broadcasting et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 210 U. S. App. D. C. 184, 655 F. 2d 297.

No. 81–334. ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC. *v.* CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL. C. A. 9th Cir. Certiorari granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 648 F. 2d 527.

No. 81–825. PILLSBURY CO. ET AL. *v.* CONBOY. C. A. 7th Cir. Certiorari granted. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 661 F. 2d 1145.

No. 81–5195. JONES *v.* UNITED STATES. Ct. App. D. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 432 A. 2d 364.

Certiorari Denied. (See also Nos. 81–5368, 81–5641, and 81–5729, *supra*.)

No. 80–5896. HALL *v.* QUILLEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 2d 1154.

No. 80–969. FIRESTONE, SECRETARY OF STATE OF FLORIDA, ET AL. *v.* DADE VOTERS FOR A FREE CHOICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 621 F. 2d 195.

No. 80–1909. HEPPENSTALL CO. *v.* MURPHY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 635 F. 2d 233.

No. 80–6303. SHAW *v.* BERNHOLZ ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 642 F. 2d 449.

No. 80–6313. BUTLER *v.* BRASSWELL. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 778.

No. 80–6546. STIGALL *v.* CARDWELL. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 493.

No. 80–6820. ORPIANO *v.* PARKER. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 492.

No. 81–257. MISSOURI EX REL. WOLFF *v.* RUDDY, JUDGE. Sup. Ct. Mo. Certiorari denied. Reported below: 617 S. W. 2d 64.

No. 81–340. PENNZOIL CO. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 360.

No. 81–424. R.O.C., INC. *v.* BROWN ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 401 So. 2d 366.

No. 81–437. RUDOLPH *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 369 So. 2d 1320.

No. 81–466. SONTAG *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 629 P. 2d 1269.

No. 81–483. CONKLIN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 655 F. 2d 1007.

No. 81–496. FEENEY ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1071.

No. 81–509. DUWAMISH INDIAN TRIBE ET AL. *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 641 F. 2d 1368.

No. 81–516. STUMPFF *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 647 F. 2d 864.

No. 81–520. NATIONAL FOOTBALL LEAGUE *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 81–522. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 1140.

No. 81–532. HOLT *v.* WYRICK, WARDEN, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 649 F. 2d 543.

No. 81–540. SOUTH PARK INDEPENDENT SCHOOL DISTRICT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 504.

No. 81–565. CONNECTICUT *v.* GLIDDEN. C. A. 2d Cir. Certiorari denied. Reported below: 653 F. 2d 85.

No. 81–594. NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120, ET AL. *v.* WILKES-BARRE PUBLISHING CO.; and

No. 81–791. WILKES-BARRE PUBLISHING CO. *v.* NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 647 F. 2d 372.

No. 81–601. COSMOPOLITAN BROADCASTING CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 81–603. BULGARIAN AMERICAN LEAGUE ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 81–615. GRAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1071.

No. 81–631. TRUONG DINH HUNG *v.* UNITED STATES; and

No. 81–5344. HUMPHREY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 629 F. 2d 908 and 667 F. 2d 1105.

No. 81–633. BASS ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 778.

No. 81–637. BAIRD ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 653 F. 2d 437.

No. 81–651. GOTTFRIED ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 210 U. S. App. D. C. 184, 655 F. 2d 297.

No. 81–653. BREWER *v.* UNITED STATES POSTAL SERVICE. Ct. Cl. Certiorari denied. Reported below: 227 Ct. Cl. 276, 647 F. 2d 1093.

No. 81–658. PACELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1061.

No. 81–660. ADDISON SAVMOR, INC. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 80.

No. 81–675. WHITE *v.* EDWARDS, SECRETARY OF ENERGY. C. C. P. A. Certiorari denied. Reported below: 653 F. 2d 479.

No. 81–676. BARBEAU *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF CONTRA COSTA (HABIB, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 81–679. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, SILVERGATE DISTRICT LODGE 50 *v.* ANDERSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 648 F. 2d 1247.

No. 81–683. MAYFAIR SUPERMARKETS, INC. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 671 F. 2d 496.

No. 81–688. TALBERT *v.* CITY OF RICHMOND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 648 F. 2d 925.

No. 81–692. STONECIPHER *v.* BRAY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 653 F. 2d 398.

No. 81–703. GAINES *v.* HAUGHTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 645 F. 2d 761.

No. 81–717. CORDOVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 650 F. 2d 189.

No. 81–736. BURLINGTON NORTHERN RAILROAD CO., SUCCESSOR IN INTEREST TO ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* DUNN. Sup. Ct. Mo. Certiorari denied. Reported below: 621 S. W. 2d 245.

No. 81–760. BILL HAMES SHOWS, INC. *v.* J. J. TAYLOR SYNDICATE #173 ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 179.

No. 81–764. EAST-WEST TOWING CO., INC., ET AL. *v.* AVONDALE SHIPYARDS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 649 F. 2d 1104.

No. 81–786. BRAMS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied.

No. 81–792. HINDS ET AL. *v.* CONSOLIDATED RAIL CORP. ET AL. Sp. Ct. R. R. R. A. Certiorari denied. Reported below: 518 F. Supp. 1350.

No. 81–803. PAVERITE, INC. *v.* ITT INDUSTRIAL CREDIT CO. Ct. App. Tenn. Certiorari denied. Reported below: 621 S. W. 2d 759.

No. 81–807. PAVILONIS *v.* MORGAN ET AL.; PAVILONIS *v.* O'BRYANT ET AL.; and PAVILONIS *v.* KING ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 657 F. 2d 260 (first and second cases); 663 F. 2d 1066 (third case).

No. 81–808. KESTER ET AL. *v.* DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 13.

No. 81–809. BOYD *v.* MADISON COUNTY MUTUAL INSURANCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 653 F. 2d 1173.

No. 81–810. NUNN ET AL. *v.* BLACK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 925.

No. 81–813. SHIMOKAWA *v.* LIBERTY BANK. Int. Ct. App. Haw. Certiorari denied. Reported below: 2 Haw. App. 280, 632 P. 2d 289.

No. 81–817. NORTHERN ENGINEERING & PLASTICS CORP. *v.* EDDY, DBA MARSHALL MANUFACTURING CO. C. A. 3d Cir. Certiorari denied. Reported below: 652 F. 2d 333.

No. 81–818. BOYNTON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 649 F. 2d 1168.

No. 81–819. STAINBROOK *v.* PENNSYLVANIA DEPARTMENT OF TRANSPORTATION. Pa. Commw. Ct. Certiorari denied. Reported below: 56 Pa. Commw. 591, 426 A. 2d 177.

No. 81–821. DANNING, TRUSTEE IN BANKRUPTCY *v.* WORLD AIRWAYS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 977.

No. 81–822. LEVISON *v.* LEVISON. Sup. Ct. Ga. Certiorari denied.

No. 81–823. THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* MCMULLAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 671 F. 2d 496.

No. 81–824. JACKS *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 651 F. 2d 480.

No. 81–829. BMW OF NORTH AMERICA, INC., ET AL. *v.* GROVE, EXECUTOR, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 81–831. DACUS *v.* SOUTHERN COLLEGE OF OPTOMETRY. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 81.

No. 81–832. FAITH BAPTIST CHURCH OF BOCA RATON, INC., NOW KNOWN AS WOODLANDS PARK BAPTIST CHURCH, ET AL. *v.* CITY OF BOCA RATON, FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 402 So. 2d 1381.

No. 81–833. ROSS *v.* BIRD, CHIEF JUSTICE, CALIFORNIA SUPREME COURT, ET AL.; and ROSS *v.* SAN DIEGO COUNTY SUPERIOR COURT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 65.

No. 81–838. THORPE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 384 Mass. 271, 424 N. E. 2d 250.

No. 81–845. INVESTORS TAX SHELTERED REAL ESTATE, LTD. *v.* HALLMARK GROUP COS., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 62.

No. 81–847. MORI ET AL. *v.* INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, LOCAL LODGE NO. 6, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 653 F. 2d 1279.

No. 81–852. WILLY'S GROCERY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 656 F. 2d 24.

No. 81–853. LINCOLN BANK *v.* GOGGIN, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 729.

No. 81–858. WATSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 81–885. FEDERAL REPUBLIC OF NIGERIA ET AL. *v.* TEXAS TRADING & MILLING CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 300.

No. 81–888. MCCOY RESTAURANTS, INC. *v.* GREATER ORLANDO AVIATION AUTHORITY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 645 F. 2d 69.

No. 81–891. INDUSTRIAL PERSONNEL CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 657 F. 2d 226.

No. 81–893. BRENT ET AL. *v.* NATURAL GAS PIPELINE COMPANY OF AMERICA. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 1261.

No. 81–894. COUNTY OF LASALLE EX REL. PETERLIN, STATE'S ATTORNEY OF LASALLE COUNTY, ET AL. *v.* MAUZY, DIRECTOR, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, ET AL. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 98 Ill. App. 3d 615, 424 N. E. 2d 857.

No. 81–898. THEVIS *v.* URBAN INDUSTRIES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 166.

No. 81–906. SHUNNARAH *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 81–909. STEUBNER ET AL. *v.* MARTIN. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 652.

No. 81–914. STEPHENS *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 934.

No. 81–916. JOHNSON *v.* WYRICK, WARDEN, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 653 F. 2d 1234.

No. 81–918. CUT RATE PLASTIC HANGERS, INC. *v.* WARBERN PACKAGING INDUSTRIES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 987.

No. 81–931. ALEXANDER *v.* KESSLER, JUDGE, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 428 A. 2d 812.

No. 81–947. TREBBE ET AL. *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 81–951. GOLDSTEIN ET AL. *v.* GARRITY, TRUSTEE OF DEBTOR. C. A. 2d Cir. Certiorari denied. Reported below: 658 F. 2d 39.

No. 81–957. RUGGIRELLO *v.* MINTZES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1027.

No. 81–958. GUZMAN ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 1074.

No. 81–966. PERCY *v.* DAUBERT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 1075.

No. 81–972. WINFIELD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 660 F. 2d 184.

No. 81–980. HATCH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–983. CONLON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 213 U. S. App. D. C. 14, 661 F. 2d 235.

No. 81–991. ENGELSTAD ET AL. *v.* SWENSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 2d 495.

No. 81–994. SIEMENS AMERICA, INC., ET AL. *v.* UNITED STATES. C. C. P. A. Certiorari denied. Reported below: 68 C. C. P. A. (Cust.) ——, 653 F. 2d 471.

No. 81–995. CROWN CORK & SEAL CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 659 F. 2d 127.

No. 81–1015. BLECKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 657 F. 2d 629.

No. 81–1027. LITMAN ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 2d 17.

No. 81–1030. LECK *v.* PUGH ET AL. Ct. Civ. App. Tex., 10th Sup. Jud. Dist. Certiorari denied. Reported below: 604 S. W. 2d 283.

No. 81–5284. SANGEMINO *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 227 Ct. Cl. 64, 645 F. 2d 45.

No. 81–5303. LAWSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 653 F. 2d 299.

No. 81–5358. BLACK *v.* ROBBINS ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–5359. GUIDEN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 399 So. 2d 194.

No. 81–5361. MORRIS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 1117.

No. 81–5376. DICKINSON *v.* PENSACOLA AEROMOTIVE CORP. ET AL. C. A. 5th Cir. Certiorari denied.

No. 81–5388. BREEDING ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1073.

No. 81–5394. BASSLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 651 F. 2d 600.

No. 81–5414. MARTIN ET AL. *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 433 A. 2d 1025.

No. 81–5420. BROWN *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 435 A. 2d 1042.

No. 81–5426. MENDOZA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–5429. FLINT ET AL. *v.* HAYNES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 651 F. 2d 970.

No. 81–5446. JONES ET AL. *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81–5485. FLOOD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 661 F. 2d 938.

No. 81-5488. MARTIN *v.* WARDEN, HUNTINGDON STATE CORRECTIONAL INSTITUTION, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 653 F. 2d 799.

No. 81–5489. MULLINS *v.* DAVIS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 933.

No. 81–5528. BRUNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 657 F. 2d 110.

No. 81–5531. HILL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 434 A. 2d 422.

No. 81–5551. TAYLOR *v.* TAYLOR. Super. Ct. Pa. Certiorari denied. Reported below: 278 Pa. Super. 339, 420 A. 2d 570.

No. 81–5616. GRAHAM *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 403 So. 2d 275.

No. 81–5625. COCHRAN *v.* BIRKEL. C. A. 6th Cir. Certiorari denied. Reported below: 651 F. 2d 1219.

No. 81–5626. UNITED STATES EX REL. BAKER *v.* FRANZEN ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–5636. GRAY *v.* SINES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 671 F. 2d 499.

No. 81–5642. CROSLEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–5645. CAUDLE *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 81–5646. OPFERMANN *v.* BARG ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1072.

No. 81–5647. PRINCE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 81–5651. UNITED STATES EX REL. SLAUGHTER *v.* BREWER, WARDEN, STATEVILLE PENITENTIARY. C. A. 7th Cir. Certiorari denied.

No. 81–5652. MENDIBLES ET AL. *v.* SUPERIOR COURT OF PINAL COUNTY ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 81–5656. KELLEY *v.* LANE. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 1076.

No. 81–5658. DARBY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 403 So. 2d 44.

No. 81–5659. KILGORE *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–5661. STONE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 83 App. Div. 2d 796, 443 N. Y. S. 2d 39.

No. 81–5663. PADILLA *v.* MACDOUGALL ET AL. C. A. 9th Cir. Certiorari denied.

No. 81–5664. MCAFEE *v.* FORD MOTOR CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 216.

No. 81–5665. SHAW *v.* DAIL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 926.

No. 81–5666. HEGWOOD *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 81–5667. EVANS ET AL. *v.* CROOM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 650 F. 2d 521.

No. 81–5669. JOHNSON ET AL. *v.* UNITED PARCEL SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 655 F. 2d 234.

No. 81–5671. GARCIA *v.* NEAGLE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 983.

No. 81–5674. LINDHORST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 658 F. 2d 598.

No. 81–5675. CARABALLO *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. Reported below: 657 F. 2d 259.

No. 81–5676. BAILEY *v.* REDMAN, WARDEN, DELAWARE CORRECTIONAL CENTER, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 657 F. 2d 21.

No. 81–5678. HARRIS *v.* BAKER. C. A. 8th Cir. Certiorari denied. Reported below: 670 F. 2d 86.

No. 81–5680. PATRICK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 293.

No. 81–5683. SALMAN *v.* FRISCH. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1089.

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No. 81–5684. MYRON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 248 Ga. 120, 281 S. E. 2d 600.

No. 81–5685. EL-AMEEN *v.* MICHIGAN CONSOLIDATED GAS CO. Ct. App. Mich. Certiorari denied.

No. 81–5688. PARTEE *v.* JOHNSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 1077.

No. 81–5690. BRADLEY *v.* DERMITT, WARDEN, IDAHO STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 939.

No. 81–5691. HANDY *v.* WESLACO INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 655 F. 2d 1130.

No. 81–5696. SATCHELL *v.* RAINES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 653 F. 2d 408.

No. 81–5702. BANKSTON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 159 Ga. App. 342, 283 S. E. 2d 319.

No. 81–5706. GRATTON *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81–5707. KING *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–5711. HERRINGTON *v.* DEUKMEJIAN, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 1079.

No. 81–5712. HOLLOWAY *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 81–5714. SENATORE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 905.

No. 81–5715. MINTZ *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF STANISLAUS (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 81–5719. SHAW *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: —— Conn. ——, 441 A. 2d 561.

No. 81–5723. STOKES *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 775.

No. 81–5724. SANDUTCH *v.* BEDNARZ, DISTRICT MAGISTRATE. C. A. 3d Cir. Certiorari denied.

No. 81–5726. RASBERRY *v.* ESTELLE. C. A. 5th Cir. Certiorari denied.

No. 81–5732. WILLIAMS *v.* CIRCUIT COURT, CITY OF ST. LOUIS, DIVISION 1. Sup. Ct. Mo. Certiorari denied.

No. 81–5735. S. L. W. *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES. Sup. Ct. N. J. Certiorari denied. Reported below: 87 N. J. 419, 434 A. 2d 1093.

No. 81–5737. LEWIS ET AL. *v.* EXXON CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 650 F. 2d 281.

No. 81–5739. GALLO *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied.

No. 81–5742. ELLIS *v.* SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 679 F. 2d 872.

No. 81–5745. SHUMAKE *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81–5766. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 1204.

No. 81–5773. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1091.

No. 81–5779. BERNAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1028.

No. 81–5780. GARONZIK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 996.

No. 81–5787. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 929.

No. 81–5788. WOMACK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 654 F. 2d 1034.

No. 81–5789. SINGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 660 F. 2d 1295.

No. 81–5792. DI SILVESTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 81–5793. JOHNSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 81–5794. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 654 F. 2d 1264.

No. 81–5799. LEYVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 118.

No. 81–5807. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1029.

No. 81–5813. HINES *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1026.

No. 81–5815. OWENS *v.* WHARTON, U. S. DEPARTMENT OF STATE, OFFICE OF CITIZENSHIP APPEALS AND LEGAL ASSISTANCE. C. A. D. C. Cir. Certiorari denied.

No. 81–5817. PHILLIPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 843.

No. 81–5832. MCGOVERN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 2d 27.

No. 81–5833. RAVASANI-ASL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1029.

No. 81–5837. DARLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 70.

No. 81–5841. SABIR *v.* RAINIER NATIONAL BANK. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 941.

No. 81–5846. ARMSTRONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 1328.

No. 81–5853. WALKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 883.

No. 80–1975. YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORP. ET AL. *v.* SUTHOFF ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 337.

JUSTICE REHNQUIST, dissenting.

Respondents in this case sought to invoke the jurisdiction of the United States District Court for the Southern District of Mississippi under the provisions of 28 U. S. C. §§ 1331 and 1343(3). They sought compensatory and punitive damages and attorney's fees or, in the alternative, the rescission of instruments by which they conveyed certain real property to petitioners. App. to Pet. for Cert. A2. Petitioners filed the customary Federal Rule of Civil Procedure 12 motions requesting dismissal of the complaint for lack of jurisdiction and for failure to state a claim upon which relief may be granted. The District Judge, a practicing Mississippi lawyer for many years before he took the bench, granted the motion to dismiss for lack of jurisdiction:

"The complaint contains conclusory allegations, but when reduced to the essentials, plaintiffs allege that while they received $100,830.00 this was not enough; that the land was in fact worth several times this amount; that they were induced to sell by the fraud and deceit of their own attorneys and appraiser; and that the remaining defendants were in a conspiracy to acquire the land for a fraction of its true worth.

"The plaintiffs thus are asserting a classic common law action for the common law tort of fraud and deceit. If the plaintiffs indeed have such a claim it is properly redressable only in the state court. The allegations do not reach Federal Constitutional proportions." *Id.*, at A3.

The Court of Appeals for the Fifth Circuit reversed the judgment of dismissal:

"The issue before us is narrow: Was the federal court without jurisdiction conferred by Congress to decide the case, on the face of the complaint, under the stringent test enunciated by *Bell* v. *Hood*, 327 U. S. 678, 681–682 . . . (1946); '[W]here the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions, . . . *must* entertain the suit.' (Italics ours.) (The two exceptions are where the federal question 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.' *Id.*) . . . .

"So tested, the complaint sufficiently states federal claims, and (without intimating as to the merits of the claims) we reverse the district court's dismissal for lack of jurisdiction." 637 F. 2d 337, 339 (1981).

Had the Court of Appeals been content to end its opinion at that point, this case would be one among hundreds where busy federal appellate courts decide whether "conclusory

allegations" made under the "notice pleading" premise of the Federal Rules of Civil Procedure do or do not properly invoke federal jurisdiction. This Court in turn would be entirely correct in concluding that the petition for certiorari does not warrant plenary consideration. But, for better or for worse, the Court of Appeals did *not* stop there. Instead, it proceeded to step on what is, in my opinion, a legal landmine when it elaborated on the meaning of *Bell* v. *Hood*, 327 U. S. 678 (1946). The Court of Appeals obviously recognized its obligation to follow the dictates of that case as best it could, and because to me the decision in *Bell* is one of the most cryptic in the recent history of this Court's jurisprudence, I have nothing but sympathy for those who seek to divine its meaning.

It is apparent from the above-quoted language of the Court of Appeals that, on remand, the District Court would be perfectly free to dismiss the complaint for failure to state a claim upon which relief may be granted. This conclusion was made crystal clear by the concluding language of the Court of Appeals:

> "We do not necessarily hold that the plaintiffs will prevail if they establish the facts alleged in the petition; we hold only that, taking the facts alleged in the complaint as true, the plaintiffs have established their right to a day in federal court. The dismissal for want of subject matter jurisdiction is reversed, and the case is remanded for further proceedings in accordance with law." 637 F. 2d, at 340.

Whether or not the allegations of the complaint were sufficient to invoke federal jurisdiction for consideration of the complaint under 42 U. S. C. § 1983 is an issue which the Court of Appeals in this case approached somewhat differently than did the Court of Appeals for the Ninth Circuit in *Beistline* v. *City of San Diego*, 256 F. 2d 421 (1958), and the Court of Appeals for the Third Circuit in *Warrington Sewer*

Co. v. *Tracy*, 463 F. 2d 771 (1972). But whether these cases are properly distinguishable, as the Court of Appeals in this case thought, see 637 F. 2d, at 340, or whether they are not, is an issue on which I would not vote to grant certiorari if it stood by itself.

The far more fundamental issue, I think, is that the decision of the Court of Appeals in this case reveals enough differences of approach among the Federal Courts of Appeals in deciding whether the federal question alleged in a complaint is "wholly insubstantial and frivolous" within the meaning of *Bell*, to suggest a need for clarification of *Bell* itself. The Court of Appeals quite accurately recognized that *Bell* created, in cases seeking recovery directly under the Constitution or laws of the United States, three tiers of review. The first tier was where the complaint stated a claim found to be wholly insubstantial and frivolous, in which case it could be dismissed *for want of jurisdiction.* The second tier was where the complaint stated a claim *not* wholly insubstantial and frivolous, in which case the federal court could not dismiss the complaint for lack of jurisdiction, but could dismiss it for failure to state a claim upon which relief may be granted. In other words, at the second-tier level, the federal court might find simply on the basis of the allegations of the complaint that no triable constitutional issue was raised, and accordingly dismiss it on that ground. The third tier of review would be where the federal court finds the *allegations of the complaint* sufficient to state a constitutional claim, and accordingly requires further pleadings, discovery, and perhaps eventually a trial on the merits to determine whether the plaintiff can prove the allegations of his complaint.

But this three-tiered analysis required by *Bell* seems to me wholly at odds with Rule 12(b) of the Federal Rules of Civil Procedure, which quite clearly contemplates only a two-tiered standard of review of a complaint on a motion to dis-

miss.* As I understand Rule 12, it requires the federal court to make a legal determination of whether or not the allegations of the complaint state a claim upon which relief can be granted. Rule 12(b)(6). This is a question of law, and if the court concludes that they do not state such a claim, an order of dismissal will be entered. But if the court concludes that the allegations *do* state a claim, the defendant will be required to answer and the case go to trial unless settled. The trial and, at earlier stages of the case, summary judgment proceedings, are for the purpose of deciding disputed issues of material fact.

With the vast expansion in the case dockets of all federal courts in recent years, the more settled the procedural system by which these cases are to run the judicial gauntlet, the better off will be litigants, lawyers, and judges. The Court of Appeals here, by its careful adherence to the dictates of *Bell*, has brought out the sharp contrast between those dictates and the Federal Rules of Civil Procedure. While the merits of the Court of Appeals' treatment of the constitutional question in this case may not justify a grant of certiorari, the question of how *Bell* can be reconciled with Rule 12, a question I believe to be fairly subsumed under

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*It might be argued that Rule 12(b)(1), which authorizes a court to dismiss a claim for lack of subject-matter jurisdiction, is the equivalent of the first tier of *Bell*. Such an interpretation of Rule 12(b)(1) is possible, however, *only* because of the existence of the three-tier analysis of *Bell* and its cryptic statement that frivolous complaints invoke no federal-court jurisdiction. In the absence of *Bell*, Rule 12(b)(1) could be properly understood as referring to dismissals for lack of diversity or amount in controversy, or other more traditional jurisdictional defects. Thus, the existence of Rule 12(b)(1) does not obviate the need to clarify *Bell*.

As 28 U. S. C. § 1915(d) demonstrates, dismissals for frivolousness can be authorized without ambiguity. This Court has not done so in Rule 12(b)(1), and Congress has implicitly expressed satisfaction with the current formulation of Rule 12(b)(1) by not seeking to add a dismissal-for-frivolousness standard—like that found in § 1915(d)—in a manner similar to its revision of the Federal Rules of Evidence.

questions 2 and 3 of the petition, does justify such action. "To conceal [the] appropriate inquiry invites mechanical or thoughtless application of misfocused doctrine." *Zablocki* v. *Redhail*, 434 U. S. 374, 396 (1978) (Stewart, J., concurring in judgment).

I would grant the petition for certiorari in this case, limited to questions 2 and 3 of the petition.

No. 81–79. MISSOURI ET AL. *v.* UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF ARKANSAS ET AL. C. A. 8th Cir. Motion of Philip Goldstein et al. to defer consideration of the petition denied. Certiorari denied. Reported below: 647 F. 2d 768.

No. 81–273. HOMETTE CORP. *v.* HARVEY, U. S. DISTRICT JUDGE. C. A. 6th Cir. Motion of respondent Laura Marie Briggs for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 81–442. NEW YORK *v.* UTTER. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 53 N. Y. 2d 213, 423 N. E. 2d 366.

No. 81–484. COLORADO *v.* LEE. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 630 P. 2d 583.

No. 81–794. PERINI, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION *v.* LINTON. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 656 F. 2d 207.

No. 81–797. TURMAN ET AL. *v.* MORALES ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 654 F. 2d 720.

No. 81–590. BAGSTAD *v.* ORANGE COUNTY TRANSIT DISTRICT ET AL. C. A. 9th Cir. Motion of Paralyzed Veterans of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 649 F. 2d 866.

No. 81–645. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS (IAM) *v.* ORGANIZATION OF PETROLEUM EXPORTING COUNTRIES (OPEC) ET AL. C. A. 9th Cir. Motion of Indonesia-U. S. Business Committee of the Indonesian Chamber of Commerce and Industry for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 649 F. 2d 1354.

No. 81–693. HULLINGHORST INDUSTRIES, INC. *v.* CARROLL ET AL. C. A. 5th Cir. Motion of respondent David E. Carroll for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 650 F. 2d 750.

No. 81–798. MURRAY INVESTMENT CO. ET AL. *v.* LIFE INSURANCE COMPANY OF VIRGINIA. C. A. 5th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 646 F. 2d 224 and 651 F. 2d 1090.

No. 81–848. PONCHARTRAIN STATE BANK *v.* MARSH INVESTMENT CORP. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 652 F. 2d 583.

No. 81–861. FLORIDA *v.* BUFORD. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 403 So. 2d 943.

No. 81–882. JOHNS-MANVILLE CORP. ET AL. *v.* WHITE ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 662 F. 2d 234.

No. 81–903. LAKEWOOD BANK & TRUST CO. *v.* ABRAMSON, TRUSTEE. C. A. 5th Cir. Motions of American Land Title Association, Federal National Mortgage Association, and Federal Land Bank of Texas et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 647 F. 2d 547.

No. 81–904. ROCKWELL INTERNATIONAL CORP. ET AL. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 662 F. 2d 910.

No. 81–929. CHAMPLIN PETROLEUM CO. *v.* KING & KING ENTERPRISES, DBA KING GAS & OIL, ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 657 F. 2d 1147.

JUSTICE WHITE, dissenting.

Because the decision of the Court of Appeals for the Tenth Circuit in this case conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Carpa, Inc.* v. *Ward Foods, Inc.*, 567 F. 2d 1316 (1978), I would grant the petition for certiorari.

No. 81–5454. ANTHON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 648 F. 2d 669.

No. 81–5496. WITHERSPOON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 402 So. 2d 1184.

No. 81–5855. BUFORD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 403 So. 2d 943.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the

Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 81–5462. MARTIN *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 10th Cir. Certiorari denied. Reported below: 653 F. 2d 428.

JUSTICE WHITE, dissenting.

Because the decision of the Court of Appeals for the Tenth Circuit in this case conflicts with the decision of the Court of Appeals for the Second Circuit in *Rosenberg* v. *Richardson*, 538 F. 2d 487 (1976), I would grant the petition for certiorari.

Rehearing Denied

No. 80–1604. BROCKETT, SPOKANE COUNTY PROSECUTING ATTORNEY, ET AL. *v.* SPOKANE ARCADES, INC., ET AL., *ante*, p. 1022;

No. 80–2077. LEEKE, DIRECTOR OF SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. *v.* TIMMERMAN ET AL., *ante*, p. 83;

No. 80–6785. SPAZIANO *v.* FLORIDA, *ante*, p. 1037;

No. 80–6933. EVANS *v.* ARIZONA, *ante*, p. 964;

No. 81–43. ODOM *v.* NORTH CAROLINA, *ante*, p. 1052;

No. 81–53. FLORIDA *v.* GARRETT, *ante*, p. 1004;

No. 81–236. GRINDSTONE BUTTE PROJECT ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL., *ante*, p. 965;

No. 81–317. WEINBERGER *v.* FLORIDA BAR, *ante*, p. 934;

No. 81–383. MCCORMICK *v.* EDWARDS, GOVERNOR OF LOUISIANA, ET AL., *ante*, p. 1017;

No. 81–387. MORRIS *v.* CITY OF MIDLAND, TEXAS, ET AL., *ante*, p. 941;

No. 81–464. VON MINDEN *v.* NUWES, DEPARTMENT OF THE NAVY, *ante*, p. 1032;

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JANUARY 12, 1982

Dismissals Under Rule 53

No. 81–884. INRYCO, INC. *v.* UNITED STATES; and

No. 81–1099. UNITED STATES *v.* INRYCO, INC. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 642 F. 2d 290.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1167 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

MORI ET AL. *v.* INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, LOCAL LODGE NO. 6, ET AL.

ON APPLICATION FOR STAY

No. A–417 (81–847). Decided November 23, 1981

An application to stay the Court of Appeals' mandate—which upheld an international union's adoption, by nonsecret ballot of the delegates at a union convention, of a new dues structure applicable to a certain group of members, notwithstanding the provisions of § 101(a)(3)(A) of the Labor-Management Reporting and Disclosure Act of 1959 requiring a secret ballot by local members to increase rates of dues—is granted until disposition of applicants' petition for certiorari. There is a strong probability that four Justices of this Court will vote to grant the petition for certiorari; applicants have a reasonable probability of success on the merits; and the balance of equities weighs heavily in their favor.

JUSTICE REHNQUIST, Circuit Justice.

The decision of the Court of Appeals for the Ninth Circuit in this case, the mandate of which I have been asked to stay, turns upon the construction of § 101(a)(3)(A) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 522, 29 U. S. C. § 411(a)(3)(A):

> "Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959, shall not be increased, and no general or special assessment shall be levied upon such members, except—

> "(A) in the case of a local labor organization, (i) by majority vote by *secret* ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by *secret* ballot." (Emphasis supplied.)

A convention of the International Union was held in August 1977 at which a majority of the delegates adopted a new dues structure applicable only to field construction members. The balloting was not secret. The new dues structure required payment of not less than two percent of gross income to the local as a "field dues supplement" to regular local dues, unless the International president approved payment of a lesser amount. These amendments, which were incorporated into Art. XX of the International's Constitution, also established an additional dues requirement of one-half of one percent of gross wages, to be collected by the local and forwarded to the International.

At the beginning of the following year, respondent Local 6 collected from the plaintiffs field dues of two percent of gross earnings plus regular dues of $13 per month. The membership of Local 6 has never approved the increase of field dues, and has attempted to adopt bylaws excluding the new field dues requirement. The membership also unsuccessfully sought permission from the president of the International to halt the collection of the supplemental dues. 653 F. 2d 1279, 1281 (CA9 1981).

Applicants contend that this action on the part of the International violated the above-quoted provisions of Title 29, and have lodged with this Court a petition for certiorari setting out the reasons why the writ should be granted. The Court of Appeals decision in this case, which upheld the validity of the dues increase, is supported by *Ranes* v. *Office Employees Union, Local No. 28*, 317 F. 2d 915 (CA7 1963), and by

dicta in *Local No. 2, International Brotherhood of Telephone Workers* v. *International Brotherhood of Telephone Workers*, 362 F. 2d 891 (CA1), cert. denied, 385 U. S. 947 (1966). It seems to me to be contrary to the decision of the Court of Appeals for the Fifth Circuit in *Steib* v. *New Orleans Clerks and Checkers, Local No. 1497*, 436 F. 2d 1101 (1971).

In my opinion, there is a strong probability that four Justices of this Court would vote to grant applicants' presently pending petition. The funds held in escrow, now totalling somewhere in the neighborhood of $150,000, would be very difficult to recover should applicants' stay not be granted. Since I believe that applicants have a reasonable probability of success on the merits, and the balance of equities weighs heavily in their favor, it is ordered that the applicants' application for stay of mandate of the United States Court of Appeals for the Ninth Circuit be, and hereby is, granted until consideration and disposition of their petition for certiorari to review the judgment of the Court of Appeals in this case.

CLEMENTS ET AL. *v.* LOGAN

ON REAPPLICATION FOR STAY

No. A–480. Decided December 9, 1981

The Court of Appeals' mandate—holding unconstitutional a policy of conducting routine strip-searches of all persons held at the Arlington County, Va., Detention Center, and remanding the case to the District Court for further proceedings—is stayed temporarily, pending consideration of the reapplication for a stay by the full Court. While the burden on an applicant for a stay to demonstrate the need for exercise of a Circuit Justice's equitable power is heavier if (as here) the request for a stay has previously been denied by another Member of this Court, the issues involved in this case warrant the full Court's consideration. There is substantial likelihood that the full Court will grant a stay pending disposition of a petition for certiorari, in view of the Court of Appeals' attempt to distinguish *Bell* v. *Wolfish*, 441 U. S. 520, which held that a requirement that pretrial detainees at a federally operated detention facility submit to a strip-search was not unreasonable under the Fourth Amendment, and which would appear to control the result in this case.

JUSTICE REHNQUIST, Circuit Justice.

Applicants, a former Sheriff of Arlington County, Va., and a Deputy Sheriff, ask that I stay the mandate of the United States Court of Appeals for the Fourth Circuit remanding this case to the District Court following the Court of Appeals' holding that a policy of strip-searches implemented at the Arlington County Detention Center is unconstitutional. This request was denied by THE CHIEF JUSTICE, and a reapplication has been addressed to me. For the reasons that follow, I have referred the reapplication to the full Court at its next regularly scheduled Conference and I have temporarily stayed the mandate of the Court of Appeals pending the Court's disposition of the stay request.

The events that prompted this suit began with respondent's arrest on suspicion of driving while intoxicated follow-

ing a two-car collision. Respondent failed several field tests for intoxication, and she was taken by police cruiser to the Arlington County Detention Center for administration of a breath-analysis examination. Respondent, an attorney, refused to take the test until allowed to telephone a friend who was also an attorney. She persisted in this demand despite being informed by the investigating officer and a Magistrate before whom she appeared that she had no right to contact an attorney under Virginia's implied-consent statute, Va. Code § 18.2–268 (1975 and Supp. 1981). The Magistrate issued two warrants against respondent, one for driving while intoxicated and the other for refusing to submit to a breath-analysis test.[1] The Magistrate authorized respondent's release on her own recognizance on the condition that a responsible person come to the Detention Center to assume custody. The Magistrate's office did not have a phone available for respondent's use, but she was informed that she could make a call upon commitment to jail. The arresting officer then transferred custody of respondent to applicant Carol Sachtleben, a Deputy Sheriff.

Prior to respondent's arrest, applicant Clements, at that time the Sheriff, had instituted a policy requiring deputies to conduct visual strip-searches of all persons held at the Center in order to discover whether weapons or contraband were being concealed. This policy was adopted after the shooting of a deputy by a misdemeanant who had not been strip-searched. Pursuant to this policy, applicant Sachtleben first inventoried respondent's personal property and then took her

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[1] Under Virginia law, driving while intoxicated is a Class 2 misdemeanor, punishable by imprisonment for up to six months and a fine of $500. Va. Code §§ 18.2–270, 18.2–11 (1975). Unreasonable refusal to submit to a breath-analysis test is punishable as a first offense by mandatory suspension of the driver's license for 90 days. Repeat offenses are punishable by imprisonment for six months. § 18.2–268(n).

to a holding cell where she conducted a visual strip-search.[2] Respondent was then allowed to call her friend, and eventually was released into her friend's custody.

Respondent subsequently brought suit for damages and injunctive relief under 42 U. S. C. § 1983, alleging an assortment of constitutional violations. She complained of (1) denial of the assistance of counsel; (2) unjustified detention following establishment of the conditions of release; and (3) the Sheriff's policy of administering strip-searches of all persons held at the Detention Center without reasonable cause to suspect concealment of weapons or contraband. The complaint named as defendants the arresting officer, a correctional officer at the Detention Center, several Deputy Sheriffs (including applicant Sachtleben), three Magistrates, the Commonwealth Attorney for Arlington County, applicant Clements, the current Sheriff Gondles, and Arlington County. Several claims were dismissed prior to trial, directed verdicts were entered as to others in favor of the defendants, and after post-trial briefing, the District Court entered judgment for defendants on those claims that remained. *Logan* v. *Shealy*, 500 F. Supp. 502 (ED Va. 1980). In particular, the court held that the policy of conducting strip-searches did not violate the Fourth Amendment. *Id.*, at 506.

The Court of Appeals for the most part affirmed, but it reversed on the issue of strip-searches. *Logan* v. *Shealy*, 660 F. 2d 1007 (CA4 1981). The court purported to rely on the standard for judging the reasonableness of searches expressed in *Bell* v. *Wolfish*, 441 U. S. 520, 559 (1979), which requires consideration of "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." The court concluded:

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[2] Respondent was asked to remove her clothing, one garment at a time, to hand them to the deputy, and to turn around for visual inspection. Respondent complied and her clothes were immediately returned to her.

> "On the undisputed and stipulated evidence, Logan's strip search bore no such discernible relationship to security needs at the Detention Center that, when balanced against the ultimate invasion of personal rights involved, it could reasonably be thought justified. At no time would Logan or similar detainees be intermingled with the general jail population; her offense, though not a minor traffic offense, was nevertheless one not commonly associated by its very nature with the possession of weapons or contraband; there was no cause in her specific case to believe that she might possess either; and when strip-searched, she had been at the Detention Center for one and one-half hours without even a pat-down search. An indiscriminate strip search policy routinely applied to detainees such as Logan along with all other detainees cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations." 660 F. 2d, at 1013.

The court remanded with directions to enter a permanent injunction against enforcement of the policy.[3] The court also reversed directed verdicts in favor of applicants and remanded with instructions that judgment be entered against them "for all damages determined by a jury to have been

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[3] The jurisdiction of the Court of Appeals to order the issuance of a permanent injunction is, I think, open to serious question. Although respondent has suffered an injury sufficient to establish her standing to seek damages, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea* v. *Littleton*, 414 U. S. 488, 495–496 (1974). As *O'Shea* makes clear, standing to seek injunctive relief depends on a showing of "a real and immediate threat of repeated injury." *Id.*, at 496. Respondent has not alleged that she anticipates being arrested again and again subjected to a strip-search at the Arlington County Detention Center. Even if she had made such an allegation, it would "tak[e] us into the area of speculation and conjecture." *Id.*, at 497. See *Rizzo* v. *Goode*, 423 U. S. 362, 371–373 (1976).

proximately caused by the strip search, unless those defendants can establish before a jury their respective defenses of good faith immunity (or any others available to them) in accordance with [the court's] opinion." *Id.*, at 1014. Applicants unsuccessfully sought a stay from the Court of Appeals. A similar request was denied by the THE CHIEF JUSTICE, and the present reapplication was delivered to me on December 8, 1981. Without a stay, trial of the damages claims against applicants will commence on December 9.

Applicants for a stay bear a heavy burden of demonstrating the need for exercise of the equitable power conferred on a Circuit Justice by 28 U. S. C. §2101(f). That burden is heavier still if the request for a stay has previously been denied by a Member of this Court. See, *e. g.*, *New York Times Co.* v. *Jascalevich*, 439 U. S. 1331, 1337 (1978) (MARSHALL, J., in chambers); *Republican State Central Committee* v. *The Ripon Society*, 409 U. S. 1222, 1227 (1972) (REHNQUIST, J., in chambers). While THE CHIEF JUSTICE is not entitled to a presumption that by virtue of his office he knows more law than the other Members of the Court, it is presumed that he knows at least as much, and his denial of relief "counsels circumspection." *Republican State Central Committee*, *supra*, at 1227.

After consideration of the reapplication and the response, I have concluded that the issues involved warrant consideration by the full Court. This opportunity will arise at the next regularly scheduled Conference on Friday, December 11. Nevertheless, that date is several days in the distance and, more importantly, the proceedings that applicants seek to stay will commence in the interim in the absence of a stay. As a result, I think it is incumbent on me to exercise my authority as Circuit Justice to determine how the matter shall remain until it can be considered by the full Court. See *Evans* v. *Atlantic Richfield Co.*, 429 U. S. 1334, 1335 (1976) (REHNQUIST, J., in chambers).

In my view, the decision of the Court of Appeals is so at odds with this Court's resolution of a similar issue in *Bell* v. *Wolfish*, *supra*, that its mandate ought to be stayed temporarily pending consideration by the full Court. *Bell* v. *Wolfish* was a class action initiated by inmates of a federally operated short-term detention facility challenging the constitutionality of numerous conditions of confinement and related administrative practices. The facility was primarily used to house persons charged with a crime but not yet brought to trial. One of the challenged practices was the requirement that inmates submit to a strip-search and visual inspection of their body cavities after every contact visit with someone from outside the institution. This Court ultimately held that under the circumstances, such searches were not unreasonable under the Fourth Amendment. 441 U. S., at 558–560. Rather, they were "reasonable responses . . . to legitimate security concerns," *id.*, at 561, and could be conducted in the absence of probable cause, *id.*, at 560.

The Court of Appeals recited from *Bell* v. *Wolfish* the general standard by which searches are judged under the Fourth Amendment, but it chose to ignore the Court's application of that standard to the practice of conducting strip-searches of persons detained after being charged with a crime. Respondent in this case was arrested and charged by a Magistrate with driving while intoxicated and unlawful refusal to submit to a breath-analysis examination.[4] The Magistrate authorized her release from the Detention Center only when a responsible individual arrived to take custody. Until that time, respondent remained officially under arrest and subject to those measures adopted for the maintenance of internal security at the jail. Her position was no different, for constitutional purposes, from the pretrial detainees in *Bell* v. *Wolfish*. If anything, the detainees in that case were subject to

[4] See n. 1, *supra*.

more onerous conditions, given the greater intrusiveness of a body-cavity search. The Court nevertheless upheld such searches "in the light of the central objective of prison administration, safeguarding institutional security." *Id.*, at 547.

The Court of Appeals gave little or no weight to that objective. The clear import of its decision is that strip-searches may not be conducted without probable cause to believe that the subject of the search possesses weapons or contraband. No such requirement attended the search policy upheld in *Bell* v. *Wolfish*, and indeed the Court expressly held that strip-searches need not be conditioned on probable cause. *Id.*, at 560. Nor was the result in *Bell* v. *Wolfish* predicated on a showing that searches were limited to those persons whose alleged offenses were "commonly associated by [their] very nature with the possession of weapons or contraband." 660 F. 2d, at 1013. In short, the Court of Appeals decision reads as if *Bell* v. *Wolfish* had never been decided. Much as that may have been the desire of the lower court, the decision is authoritative precedent and I believe it clearly dictates a contrary result in this case.

In view of the Court of Appeals' attempt to distinguish a decision of this Court which to me seems clearly applicable to the case before it, I believe there is substantial likelihood that the full Court will grant a stay pending disposition of the petition for certiorari. A delay in the proceedings until the Court has an opportunity to consider the application will not prejudice respondent, and it will forestall the expense and effort of a trial until the legal basis for further proceedings is clarified. Accordingly, the mandate of the Court of Appeals is hereby stayed temporarily, pending consideration of the application for a stay by the full Court at the next regularly scheduled Conference.

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EIGHTH AMENDMENT. See Civil Rights Act of 1871; Constitutional Law, I.

ELECTIONS. See Constitutional Law, V, 1; Federal Election Campaign Act of 1971; Voting Rights Act of 1965.

EMINENT DOMAIN. See Constitutional Law, III.

EMPLOYER AND EMPLOYEES. See Jurisdiction; National Labor Relations Act; National Labor Relations Board.

ENVIRONMENTAL IMPACT STATEMENTS. See National Environmental Policy Act of 1969.

EQUAL PROTECTION OF THE LAWS. See Constitutional Law, IV.

ESTABLISHMENT OF RELIGION CLAUSE. See Constitutional Law, V, 3; Standing to Sue, 1.

EVIDENCE. See Constitutional Law, V, 2.

EXEMPTION 1 OF FREEDOM OF INFORMATION ACT. See National Environmental Policy Act of 1969.

EXHAUSTION OF STATE REMEDIES. See Habeas Corpus.

EXPENDITURES FOR PURPOSE OF INFLUENCING BALLOT MEASURES. See Constitutional Law, V, 1.

EXPENDITURES OF POLITICAL PARTIES FOR CANDIDATES. See Federal Election Campaign Act of 1971.

FAIR LABOR STANDARDS ACT. See Jurisdiction.

FEDERAL ELECTION CAMPAIGN ACT OF 1971.

Political parties—Committees' expenditures for Senate and House candidates.—Provision of Act limiting amount that a political party's national and state committees may spend for a United States Senate or House of Representatives candidate does not foreclose use of agency agreements

FEDERAL ELECTION CAMPAIGN ACT OF 1971—Continued.
whereby a political committee organized to support a party's candidates for Senate—although not authorized by Act to itself make expenditures on behalf of candidates—is designated to act as agent in making expenditures on behalf of national and state party committees, and thus Federal Election Commission acted within its authority in permitting such agreements. FEC v. Democratic Senatorial Campaign Committee, p. 27.

FEDERAL ELECTION COMMISSION. See **Federal Election Campaign Act of 1971.**

FEDERAL OIL AND GAS LEASES. See **Outer Continental Shelf Lands Act of 1953.**

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949. See **Standing to Sue, 1.**

FEDERAL-STATE RELATIONS. See also **Habeas Corpus; Outer Continental Shelf Lands Act of 1953, 2; Servicemen's Group Life Insurance Act of 1965; Voting Rights Act of 1965.**

State taxes—Federal-court damages actions—Comity.—Principle of comity bars taxpayers' damages actions brought in federal courts under 42 U. S. C. § 1983 to redress allegedly unconstitutional administration of a state tax system, and because of such bar, it is not necessary to decide whether Tax Injunction Act, standing alone, would bar such actions. Fair Assessment in Real Estate Assn. v. McNary, p. 100.

FEDERAL YOUTH CORRECTIONS ACT.

Treatment of offender—Subsequent adult sentence.—Act does not require treatment thereunder for remainder of a youth sentence where judge imposing a subsequent adult sentence determines that such treatment will not benefit offender further. Ralston v. Robinson, p. 201.

FIFTH AMENDMENT. See **Constitutional Law, III.**

FIRST AMENDMENT. See **Constitutional Law, V; Standing to Sue, 1.**

FORUM NON CONVENIENS DOCTRINE. See **Dismissal of Actions.**

FOURTEENTH AMENDMENT. See **Civil Rights Act of 1871; Constitutional Law, I–IV; V, 2.**

FOURTH AMENDMENT. See **Stays, 1.**

FREEDOM OF ASSOCIATION. See **Constitutional Law, V, 1.**

FREEDOM OF INFORMATION ACT. See **National Environmental Policy Act of 1969.**

FREEDOM OF RELIGION. See **Constitutional Law, V, 3; Standing to Sue, 1.**

FREEDOM OF SPEECH. See **Constitutional Law, V.**

FRIVOLOUS ACTIONS. See **Pleading.**

GOVERNMENT EMPLOYEES. See also **Constitutional Law, IV, 1; Limitation of Actions.**

Pay rates—Promotion from "prevailing wage" system to General Schedule system.—Title 5 U. S. C. § 5334(b), which provides for a two-step pay increase when a federal employee under General Schedule pay system is promoted to a higher grade in that system, does not apply to employees under "prevailing wage" pay system who are promoted to General Schedule positions. United States v. Clark, p. 555.

HABEAS CORPUS.

State prisoner—Federal relief—Exhaustion of state remedies.—State prisoner's petition for federal habeas corpus relief must be dismissed for failure to exhaust state remedies where, after state murder conviction was affirmed and District Court denied habeas relief, prisoner claimed for first time on appeal to Court of Appeals that he had been denied effective assistance of counsel on basis of a prosecution witness' testimony at state trial that she had been represented on a traffic charge by prisoner's attorney's law firm and had asked prisoner's attorney to represent her on a pending criminal charge unrelated to charge against prisoner. Duckworth v. Serrano, p. 1.

HEARINGS TO DETERMINE RELEASE ON PAROLE. See **Constitutional Law, II, 2.**

"HYPOTHETICAL ENVIRONMENTAL IMPACT STATEMENTS." See **National Environmental Policy Act of 1969.**

IMPAIRMENT OF CONTRACTS. See **Constitutional Law, VI.**

INCONSISTENT VERDICTS. See **Criminal Law.**

INDIANA. See **Constitutional Law, II, 1; III; IV, 2; VI; Habeas Corpus; Mineral Rights.**

INJUNCTIONS. See **Federal-State Relations.**

INSURANCE. See **Servicemen's Group Life Insurance Act of 1965.**

JURISDICTION.

Court of Appeals.—Where direct appeal to this Court could have been taken from District Court's decision holding Fair Labor Standards Act unconstitutional as applied to employees of appellee's mental health facility, Court of Appeals lacked jurisdiction of appeal, its judgment must be vacated, and appeal therefrom to this Court must be dismissed. Donovan v. Richland County Assn. for Retarded Citizens, p. 389.

JUST COMPENSATION CLAUSE. See **Constitutional Law, III.**

JUSTICIABILITY. See **Standing to Sue, 2.**

LABOR MANAGEMENT RELATIONS ACT. See **National Labor Relations Board.**

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959. See **Stays, 2.**

"LABOR NEXUS" OF CONFIDENTIAL EMPLOYEES. See **National Labor Relations Board.**

LABOR UNIONS. See **National Labor Relations Act; National Labor Relations Board; Stays, 2.**

LAPSE OF MINERAL INTERESTS. See **Constitutional Law, II, 1; III; IV, 2; VI; Mineral Rights.**

LEASES. See **Constitutional Law, VI; Outer Continental Shelf Lands Act of 1953.**

LIFE INSURANCE. See **Servicemen's Group Life Insurance Act of 1965.**

LIMITATION OF ACTIONS.

Civil rights action—Termination of employment—Commencement of limitations period.—As to respondents' claims that 42 U. S. C. § 1983 was violated by terminations of their employment as nontenured administrators of Puerto Rico Department of Education, applicable 1-year limitations period began to run from dates when they received letters notifying them of dates in future when their appointments would terminate, not from dates of actual termination. Chardon v. Fernandez, p. 6.

LIMITATION ON CONTRIBUTIONS TO COMMITTEES FOR INFLUENCING BALLOT MEASURES. See **Constitutional Law, V, 1.**

LOCAL UNION DUES. See **Stays, 2.**

MAINE. See **Servicemen's Group Life Insurance Act of 1965.**

MANUFACTURERS OF AIRPLANES. See **Dismissal of Actions.**

MINERAL RIGHTS. See also **Constitutional Law, II, 1; III; IV, 2; VI.**

Lapse for failure to use mineral interest—Power of State.—A State has power to enact a statute such as Indiana's Mineral Lapse Act—which provides that a severed mineral interest that is not used for 20 years automatically lapses and reverts to current surface owner of property, unless mineral owner files statement of claim in county recorder's office before end of 20-year period or within 2-year grace period after Act's effective date—and Indiana did not exercise its power in an arbitrary manner. Texaco, Inc. v. Short, p. 516.

MISSOURI. See **Federal-State Relations.**

MOOTNESS. See **Pleading.**

MOTION PICTURES. See **Constitutional Law, V, 2.**

MULTIEMPLOYER BARGAINING UNITS. See **National Labor Relations Act.**

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.

Environmental Impact Statements—Storage facilities for nuclear weapons.—In view of Act's provisions requiring federal agencies, "to the fullest extent possible," to issue Environmental Impact Statements as to federal actions significantly affecting environment, and also making public disclosure of such statements subject to provisions of Freedom of Information Act, Court of Appeals erred in requiring Navy to prepare and release to public a "Hypothetical Environmental Impact Statement" as to construction of storage facilities capable of storing nuclear weapons. Weinberger v. Catholic Action of Hawaii, p. 139.

NATIONAL LABOR RELATIONS ACT. See also **National Labor Relations Board.**

Unfair labor practice—Bargaining impasse—Employer's withdrawal from multiemployer bargaining unit.—A bargaining impasse between a union and an association formed to negotiate collective-bargaining agreements as a multiemployer unit—union having then initiated a selective strike against petitioner, who was a member of association—did not justify petitioner's unilateral withdrawal from association, and National Labor Relations Board properly concluded that petitioner's refusal to sign a collective-bargaining agreement later executed by union and association thus constituted an unfair labor practice. Charles D. Bonanno Linen Service, Inc. v. NLRB, p. 404.

NATIONAL LABOR RELATIONS BOARD. See also **National Labor Relations Act.**

Collective-bargaining units—Exclusion of confidential employees.—There is a reasonable basis in law for Board's practice of excluding from collective-bargaining units only those confidential employees with a "labor nexus," while rejecting any claim that all employees with access to confidential information are beyond reach of definition of "employee" in § 2(3) of National Labor Relations Act. NLRB v. Hendricks County Rural Electric Membership Corp., p. 170.

NATIONAL SECURITY. See **National Environmental Policy Act of 1969.**

NAVY. See **National Environmental Policy Act of 1969.**

NOTICE OF LAPSE OF MINERAL INTERESTS. See **Constitutional Law, II, 1.**

NUCLEAR WEAPONS STORAGE FACILITIES. See **National Environmental Policy Act of 1969.**

NUISANCES. See **Constitutional Law, V, 2.**

OBSCENE FILMS. See **Constitutional Law, V, 2.**

OHIO. See **Constitutional Law, II, 2.**

OIL AND GAS LEASES. See **Constitutional Law, VI; Outer Continental Shelf Lands Act of 1953.**

OUTER CONTINENTAL SHELF LANDS ACT OF 1953.

1. *Oil and gas leases—Systems for soliciting bids—Secretary of Interior's discretion.*—Court of Appeals erred in compelling Secretary of Interior to experiment with certain types of systems for soliciting bids for oil and gas leases under Act's provisions authorizing and requiring him to experiment with specified alternative bidding systems, but leaving details to his discretion. Watt v. Energy Action Educational Foundation, p. 151.

2. *Oil and gas leases—Systems for soliciting bids—Standing to sue.*—In view of Act's provisions relating to Federal Government's duty to turn over a share of revenues of Outer Continental Shelf oil and gas leases to neighboring coastal States, California has standing to challenge Secretary of Interior's choice of bidding systems under Act's provisions authorizing and requiring him to experiment with systems for soliciting bids for such leases. Watt v. Energy Action Educational Foundation, p. 151.

PAROLE. See **Constitutional Law, II, 2.**

PLEADING.

Action by prisoner—Sufficiency of pro se complaint.—Where a state prisoner filed a crudely written *pro se* complaint in Federal District Court alleging wrongful solitary confinement in a certain prison and where District Court dismissed complaint for mootness, Court of Appeals' affirmance on ground that action was frivolous and did not state a claim upon which relief could be granted was erroneous, since inartful pleadings are to be construed liberally in *pro se* actions and thus complaint here stated a cause of action. Boag v. MacDougall, p. 364.

POLITICAL PARTY COMMITTEES' EXPENDITURES FOR CANDIDATES. See **Federal Election Campaign Act of 1971.**

PRECLEARANCE OF ELECTION LAWS. See **Voting Rights Act of 1965.**

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Servicemen's Group Life Insurance Act of 1965.**

PRETRIAL DETAINEES. See Stays, 1.

"PREVAILING WAGE" PAY SYSTEM. See Government Employees.

PRISONERS. See Constitutional Law, II, 2; Federal Youth Corrections Act; Habeas Corpus; Pleading; Standing to Sue, 2; Stays, 1.

PRISON UPRISINGS. See Standing to Sue, 2.

PROBATION OFFICERS. See Constitutional Law, IV, 1.

PROMOTIONS. See Government Employees.

PROPERTY CLAUSE. See Standing to Sue, 1.

PROPERTY TAXES. See Federal-State Relations.

PROPORTIONALITY OF PUNISHMENT TO OFFENSE. See Constitutional Law, I.

PRO SE COMPLAINTS. See Pleading.

PUBLIC DEFENDERS. See Civil Rights Act of 1871.

PUBLIC DISCLOSURE OF INFORMATION. See National Environmental Policy Act of 1969.

PUBLIC EMPLOYEES. See Constitutional Law, IV, 1; Government Employees; Limitation of Actions.

PUBLIC NUISANCES. See Constitutional Law, V, 2.

PUERTO RICO. See Limitation of Actions.

REAL PROPERTY TAXES. See Federal-State Relations.

REASONABLE-DOUBT STANDARD. See Constitutional Law, V, 2.

RELIGIOUS FREEDOM. See Constitutional Law, V, 3; Standing to Sue, 1.

RESCISSION OF DECISION TO GRANT PAROLE. See Constitutional Law, II, 2.

RESIDENT ALIENS. See Constitutional Law, IV, 1.

REVERSION OF MINERAL INTERESTS TO PROPERTY'S SURFACE OWNER. See Constitutional Law, II, 1; III; IV, 2; VI; Mineral Rights.

RIGHT OF ASSOCIATION. See Constitutional Law, V, 1.

RIGHT TO COUNSEL. See Civil Rights Act of 1871; Habeas Corpus.

SCOTLAND. See Dismissal of Actions.

SEARCHES AND SEIZURES. See Stays, 1.

SECRETARY OF THE INTERIOR. See **Outer Continental Shelf Lands Act of 1953.**

SENTENCES OF YOUTH OFFENDERS. See **Federal Youth Corrections Act.**

SERVICEMEN'S GROUP LIFE INSURANCE ACT OF 1965.

Change of beneficiary—Divorce—Constructive trust.—Where Maine divorce decree ordered serviceman to keep insurance policy on his life, issued pursuant to Act, in force for benefit of his children but, upon remarrying, serviceman, as authorized by Act, changed beneficiary designation of policy (originally designating first wife as beneficiary) to one whereby proceeds would be paid to second wife, insured's beneficiary designation prevailed over constructive trust imposed for children's benefit by Maine state court on proceeds paid to second wife after insured's death. Ridgway v. Ridgway, p. 46.

SIXTH AMENDMENT. See **Civil Rights Act of 1871; Habeas Corpus.**

SOLICITATION OF BIDS FOR OIL AND GAS LEASES. See **Outer Continental Shelf Lands Act of 1953.**

SOLITARY CONFINEMENT. See **Pleading.**

SOUTH CAROLINA. See **Standing to Sue, 2.**

STANDARD OF PROOF. See **Constitutional Law, V, 2.**

STANDING TO SUE. See also **Outer Continental Shelf Lands Act of 1953, 2.**

1. *Government surplus property—Conveyance to church-related college—Standing to challenge.*—Respondents, an organization dedicated to separation of church and state and several of its employees, do not have standing, either in their capacity as taxpayers or as citizens, to challenge a conveyance, for educational use, of surplus Federal Government real property to petitioner church-related college pursuant to Federal Property and Administrative Services Act of 1949 on asserted ground that conveyance violated Establishment Clause. Valley Forge Christian College v. Americans United for Separation of Church and State, p. 464.

2. *Prisoners—Injuries during prison uprising—Warrants for arrest of guards.*—A private citizen has no judicially cognizable right to prevent state officials from presenting information, through intervention of state solicitor, that will assist a magistrate in determining whether to issue an arrest warrant, and thus actions of South Carolina officials, by which they influenced State Solicitor's decision to oppose issuance by Magistrate of warrants for arrests of prison guards who allegedly unnecessarily beat respondent inmates during a prison uprising, did not violate any judicially cognizable rights of respondents. Leeke v. Timmerman, p. 83.

STATE UNIVERSITIES. See **Constitutional Law, V, 3.**

STATUTES OF LIMITATIONS. See **Limitation of Actions.**

STAYS.

1. *Court of Appeals' mandate—County detention center—Strip-searches.*—Reapplication to stay Court of Appeals' mandate holding unconstitutional a policy of conducting routine strip-searches of all persons held at a county detention center and remanding case to District Court for further proceedings, is granted pending full Court's consideration of such reapplication for a stay. Clements v. Logan (REHNQUIST, J., in chambers), p. 1304.

2. *Court of Appeals' mandate—Union dues.*—Application to stay Court of Appeals' mandate—which upheld an international union's adoption, by nonsecret ballot of delegates at a union convention, of a new dues structure applicable to a certain group of members, notwithstanding provisions of § 101(a)(3)(A) of Labor-Management Reporting and Disclosure Act of 1959 requiring a secret ballot by local members to increase rates of dues—is granted. Mori v. Boilermakers (REHNQUIST, J., in chambers), p. 1301.

"STEP" PAY INCREASES. See **Government Employees.**

STORAGE FACILITIES FOR NUCLEAR WEAPONS. See **National Environmental Policy Act of 1969.**

STRIKES. See **National Labor Relations Act.**

STRIP-SEARCHES. See **Stays, 1.**

STUDENT RELIGIOUS GROUPS' USE OF UNIVERSITY FACILITIES. See **Constitutional Law, V, 3.**

SUMTER COUNTY, S. C. See **Voting Rights Act of 1965.**

SUPREMACY CLAUSE. See **Servicemen's Group Life Insurance Act of 1965.**

SUPREME COURT. See also **Jurisdiction.**

1. Assignment of Justice Stewart (retired) to the United States Court of Appeals for the Sixth Circuit, p. 883.

2. Assignment of Justice Stewart (retired) to the United States Court of Appeals for the Seventh Circuit, p. 1095

3. New allotment of Justices, p. IV.

4. Presentation of Solicitor General, p. V.

SURPLUS GOVERNMENT PROPERTY. See **Standing to Sue, 1.**

TAFT-HARTLEY ACT. See **National Labor Relations Board.**

TAKING OF PROPERTY FOR PUBLIC USE. See **Constitutional Law, III.**

TAXES. See **Federal-State Relations.**

TAXING AND SPENDING CLAUSE. See **Standing to Sue, 1.**

TAX INJUNCTION ACT. See **Federal-State Relations.**

TAXPAYERS' STANDING TO SUE. See **Standing to Sue, 1.**

TERMINATION OF EMPLOYMENT. See **Limitation of Actions.**

THEATERS. See **Constitutional Law, V, 2.**

UNFAIR LABOR PRACTICES. See **National Labor Relations Act.**

UNION DUES. See **Stays, 2.**

UNIONS. See **National Labor Relations Act; Stays, 2.**

UNIVERSITIES AND COLLEGES. See **Constitutional Law, V, 3; Standing to Sue, 1.**

VOTING RIGHTS ACT OF 1965.

County election method—Attorney General's objection—Reconsideration.—Where Attorney General had made timely objection, pursuant to preclearance requirements of Act, to county's use of at-large method of election for its council-administrator form of government adopted in 1976, county's 1979 letter to Attorney General advising him of 1978 county referendum that approved at-large elections was properly treated by him as a reconsideration request (which he denied), rather than a new preclearance submission subject to Act's timely-action requirements. Blanding v. DuBose, p. 393.

WAGES. See **Government Employees.**

WARRANTS FOR ARREST OF PRISON GUARDS. See **Standing to Sue, 2.**

WITHDRAWAL BY EMPLOYER FROM BARGAINING UNIT. See **National Labor Relations Act.**

WORDS AND PHRASES.

"Employee." § 2(3), National Labor Relations Act, 29 U. S. C. § 152(3). NLRB v. Hendricks County Rural Electric Membership Corp., p. 170.

WRONGFUL-DEATH ACTIONS. See **Dismissal of Actions.**

YOUTH OFFENDERS. See **Federal Youth Corrections Act.**